TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 302. 72

THE STEAMSHIP "STYRIA," ANTONIO G. SCOPINICH, CLAIMANT, PETITIONER,

vs.

JAMES L. MORGAN ET AL.

No. 304. 73

THE STEAMSHIP "STYRIA," ANTONIO G. SCOPINICH, CLAIMANT, PETITIONER,

vs.

SCHUYLER L. PARSONS.

No. 303. 74

THE STEAMSHIP "STYRIA," ANTONIO G. SCOPINICH, CLAIMANT, PETITIONER,

vs.

ALFRED S. MALCOLMSON.

No. 303. 75

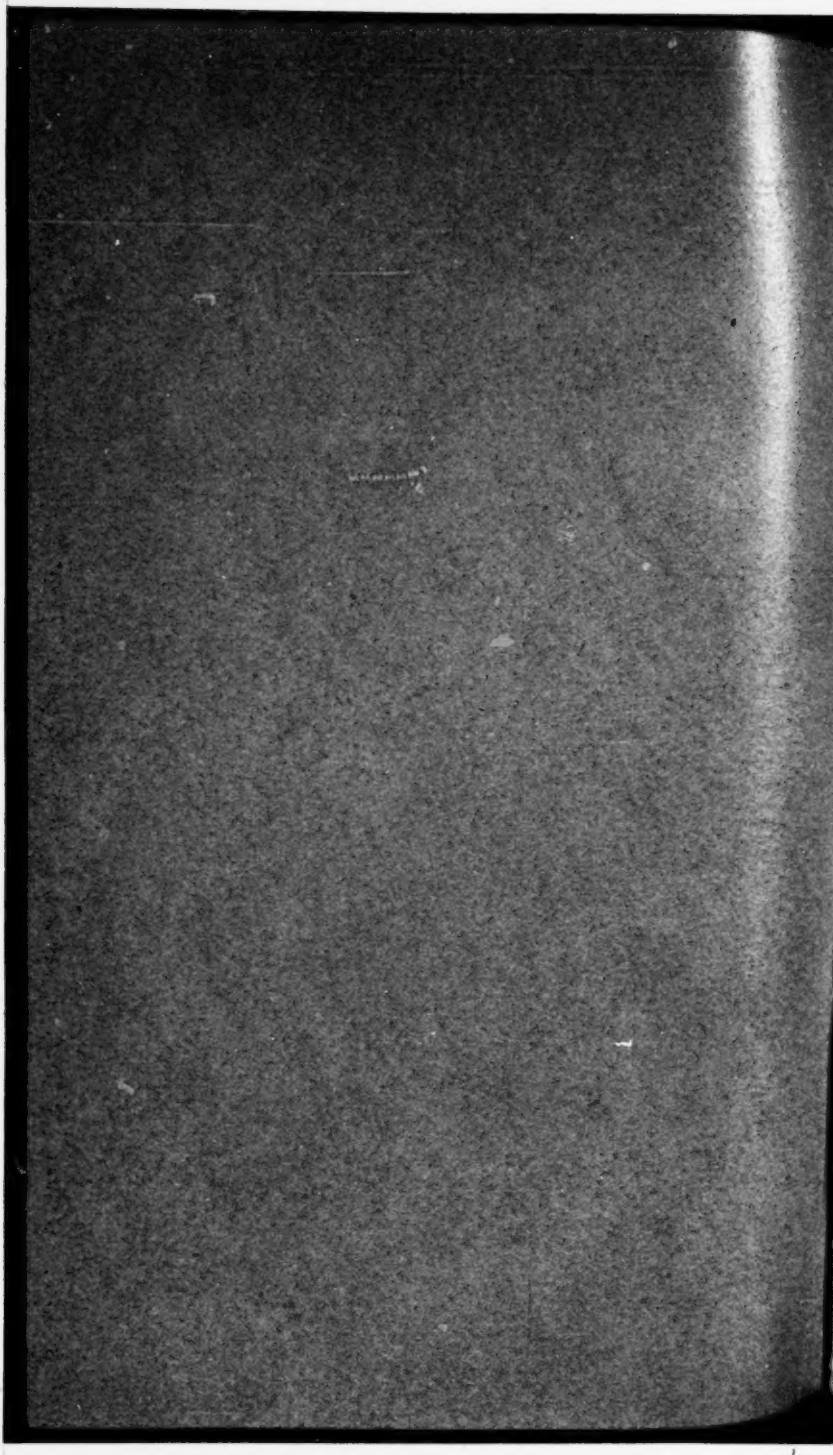
THE STEAMSHIP "STYRIA," ANTONIO G. SCOPINICH, CLAIMANT, PETITIONER,

vs.

JOHN MUNROE ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRITS OF CERTIORARI FILED MAY 26, 1900.—PETITION FOR CROSS-WRITS OF CERTIORARI FILED NOVEMBER 12, 1900.



(17,785, 17,786, 17,787, and 17,788.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 300.

THE STEAMSHIP "STYRIA," ANTONIO G. SCOPINICH, CLAIMANT, PETITIONER,

vs.

JAMES L. MORGAN ET AL.

No. 301.

THE STEAMSHIP "STYRIA," ANTONIO G. SCOPINICH, CLAIMANT, PETITIONER,

vs.

SCHUYLER L. PARSONS.

No. 302.

THE STEAMSHIP "STYRIA," ANTONIO G. SCOPINICH, CLAIMANT, PETITIONER,

vs.

ALFRED S. MALCOLMSON.

No. 303.

THE STEAMSHIP "STYRIA," ANTONIO G. SCOPINICH, CLAIMANT, PETITIONER,

vs.

JOHN MUNROE ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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UNITED STATES DISTRICT COURT, [1]

SOUTHERN DISTRICT OF NEW YORK.

JAMES L. MORGAN *et al.*,
Libellant-Appellants,

AGAINST

The Steamship "STYRIA," her engines, &c.,
Respondent-Appellee. [2]

SCHUYLER L. PARSONS,
Libellant-Appellant,

AGAINST

The Same. [3]

ALFRED S. MALCOLMSON,
Libellant-Appellant,

AGAINST

The Same.

JOHN MUNROE *et al.*,
Libellant-Appellants, [4]

AGAINST

The Same.

5 AUSTRO-AMERICANA STEAMSHIP COMPANY owners of the Steamships "STYRIA" and "ABBAZIA,"
Libellant-Appellant,

AGAINST

3250 Cantors of Brimstone owned by JAMES L. MORGAN & Co.,
Respondent-Appellee.

6

Same,
Libellant-Appellant,

vs.

4550 Cantors of Brimstone owned by SCHUYLER L. PARSONS,
Respondent-Appellee.

7

Same,
Libellant-Appellant,

vs.

1500 tons of Brimstone owned by ALFRED S. MALCOLMSON,
Respondent-Appellee.

8

Same,
Libellant-Appellant,

vs.

100 tons of Brimstone owned by JOHN MUNROE & Co.,
Respondent-Appellee.

STATEMENT.

1898.

June 4. Libel of J. L. Morgan filed.

Dec. 1. Answer therein filed.

June 6. Libel of Schuyler L. Parsons filed.

Dec. 1. Answer therein filed.

June 4. Libel of Alfred S. Malcolmson filed.

Dec. 1. Answer therein filed.

June 7. Libel of John Munroe *et al.* filed.

Dec. 1. Answer therein filed.

Oct. 1. Libel Austro-Americana Steamship Company against 3250 Cantors of Brimstone owned by J L. Morgan *et al.* filed.

1899.

Feb. 15. Answer therein filed.

1898.

Oct. 1. Libel of Same *v.* 45 0 Cantors of Brimstone. Parsons owner, filed.

Dec. 31. Answer therein filed.

Oct. 1. Libel of Same against 1500 tons of Brimstone, Malcolmson, owner, filed.

Oct. 8. Answer therein filed.

Oct. 1. Libel of Same *v.* 100 tons of Brimstone, Munroe *et al.* owners, filed.

1899.

Jan. 9. Answer therein filed.

Feb. 14. Cause tried before Hon. Addison Brown, U. S. District Judge.

Apl. 5. Causes decided. The four several libels of the Austro-Americana S. S. Company dismissed with costs. Decree for damages in favor of libellants Morgan, Parsons, Malcolmson and Munroe respectively, with interlocutory decrees and orders of reference to ascertain damage.

June 30. Commissioner's report in suit of Morgan filed.

Aug. 31, do in suit of Parsons.

" " do in suit of Malcolmson.

Oct. 9. do in suit of Munroe.

13 June 30. Libellant's exceptions to Commissioner's report in suit of Morgan filed.
Jul. 5. Claimant's do filed.
Sept. 8. Libellant's exceptions to Commissioner's report in suit of Parsons filed.
" 9. Claimant's do filed.
Aug. 31. Libellant's exceptions to Commissioner's report in suit of Malcolmson filed.
Sept. 9. Claimant's do filed.
Oct. 9. Libellant's exceptions to Commissioner's
14 report in suit of Munroe filed.
" 11. Claimant's do filed.
July 7. Opinion by Brown, J., on foregoing exceptions filed. Report confirmed.
Aug. 5. Final decree in suit of Morgan filed.
Oct. 4. do. Parsons.
" 9. do. Malcolmson.
" 27. do Monroe.
1899.
Apl. 22. Libellant's notice of appeal in suit of Aus-
15 tro-Americana S. S. Company *v.* 3250 Cantors Brimstone, Morgan owner, filed.
Oct. 11. do. 4550 Cantors, Parsons owner.
Oct. 12. do. 1500 tons, Malcolmson owner.
Oct. 30. do. 100 tons, Munroe owner.
Jul. 28. do. Morgan *et al. v.* S. S. *Styria.*
Oct. 12. do. Parsons *v.* Same.
Oct. 12. do. Malcolmson *v.* Same.
Nov. 1. do. Munroe *v.* Same.
Jul. 29. Claimant's Notice of Appeal, Morgan *v.* S.
16 S. *Styria*, filed.
Oct. 10. do. Parsons *v.* Same.
Oct. 11. do. Malcolmson *v.* Same.
Oct. 30. do. Munroe *v.* Same.
Oct. 12. Libellant's Assignment of Errors in Austro-Americana S. S. Co. *v.* 3250 Cantors, Morgan owner, filed.
Oct. 12. Same *v.* 4550 Cantors, Parsons owner.
Oct. 12. Same *v.* 1500 tons, Malcolmson owner.
Oct. 30. Same *v.* 100 tons, Munroe owner.

Aug. 16. Libellant's Assignment of Errors, Morgan *et al. v.* S. S. *Styria*, filed. 17
Oct. 13. do. Parsons *v.* Same.
Oct. 13. do. Malcolmson *v.* Same.
Nov. 1. do. Munroe *v.* Same.
Oct. 12. Claimant's Assignment of Errors, Morgan *v.* S. S. *Styria*, filed.
Oct. 12. do. Parsons *v.* Same.
Oct. 12. do. Malcolmson *v.* Same.
Oct. 30. do Munroe *v.* Same

18

To the Hon. Addison Brown, Judge of the District Court of the United States for the Southern District of New York:

The libel of James L. Morgan, John M. Goetchius, James L. Morgan, Jr., Henry K. Goetchius and Lancaster Morgan, against the steamship *Styria*, in a cause of contract, civil and maritime, alleges as follows:

First—The libellants were at the time hereinafter 19
mentioned and are merchants now doing business in the City of New York, as copartners, under the firm name of James L. Morgan & Company.

Second—On or about the 23rd day of April, 1898, John Sofio and Company shipped on board said steamship, then lying in the port of Girgenti and bound for the port of New York, in good order and condition, 3,250 Sicilian cantars of crude brimstone, best third, Licati quality. Said brimstone was the property of 20
the libellants. The master of said vessel executed and delivered a bill of lading for said brimstone, to which the libellants beg leave to refer and make a part of this their libel, whereby, among other things, it was agreed that said brimstone was to be delivered at the port of New York in the like good order and condition unto Messrs. Brown Brothers & Company, or to his or their assign, on payment of an agreed freight.

Third—Instead of proceeding to New York and making delivery of said brimstone, as agreed to, the

21 libellants, who were the owners thereof, said steamship, as the libellants are informed, discharged said brimstone at the port of Empedocle, Girgenti, and proceeded without said cargo to the port of New York, where she arrived on or about June 3rd, 1898, and now is within the jurisdiction of this Court.

FOURTH—By reason of the matters aforesaid, the libellants have sustained damages in the sum of $5,000, no part of which has been paid, although payment
22 thereof has been duly demanded.

FIFTH—All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore the libellants pray that process in due form may issue against said steamship *Styria*, her engines, etc., and that all persons claiming any interest therein may be cited to appear and answer the matters aforesaid, and that said steamship may be condemned
23 and sold to satisfy the claim of the libellants, with interest and costs.

JAMES L. MORGAN, JR.

Sworn to before me this 2nd day of June, 1898, by James L. Morgan, Jr.

HULBERT TEN EYCK BEARDSLEY,
[SEAL.] Notary Public,
N. Y. Co.

24 [Endorsed:]—Libel.—Filed June 4, 1898.—Cowen, Wing, Putnam & Burlingham, Proctors for Libellants.

To the Honorable Addison Brown, United States District Judge, for the Southern District of New York: 25

The answer of Antonio G. Scopinich, claimant of the steamship *Styria* to the libel of James L. Morgan, John M. Goetchius, James L. Morgan, Jr., Henry K. Goetchius and Lancaster Morgan against the said steamship, in a cause of contract, civil and maritime, alleges as follows:

26

First.—He admits the matters alleged in the first article of the libel.

Second.—He admits that on or before the 23rd of April, 1898, John Sofio & Co. shipped on board said steamship, then lying in the port af Girgenti, and bound for the port of New York, a quantity of brimstone, otherwise known as "sulphur," said to weigh 3,250 Sicilian cantars, and to be best thirds, Licata quality, and that the master of said vessel executed and delivered a bill of lading, to which the claimant 27 begs leave to refer and to make a part of this answer, whereby, amongst other things, it was agreed that said brimstone should be delivered at the port of New York, or as near thereto as the steamer could safely get with the said cargo, unto the order of Brown Brothers & Co., on payment of the agreed freight, and upon the other terms and conditions expressed in the said contract.

He denies any knowledge or information sufficient to form a belief as to the other matters alleged in the 28 second article of the libel.

Third.—He admits that the steamship afterwards sailed and proceeded to the port of New York, arriving on or about the 3rd day of June, 1898, but did not then and there deliver the said sulphur unto the libellants.

He denies any knowledge or information sufficient to form a belief, with regard to the other matters alleged in the third article of the libel. He further

says that by reason of the outbreak of war between Spain and the United States, and the declaration of the Government of Spain that sulphur was contraband of war, it became, in his judgment, unsafe to transport the said cargo past the coast of Spain and through the Straits of Gibraltar to New York, and that, accordingly, he re-landed and stored the cargo at the port of shipment, on due notice to the shippers, and that he was justified, under the circumstances, in so doing.

FOURTH.—Upon information and belief, he denies the matters alleged in the fourth article of the libel.

FIFTH.—He admits the jurdisiction, but denies the other matters alleged in the fifth article of the libel.

SIXTH.—Further answering the said libel, and for a further and separate defense thereto, claimant alleges as follows:

(1.) That the bill of lading under which the said brimstone, otherwise called "sulphur," was carried, provided that it was to be delivered "at the aforesaid port of New York, or so near thereunto as she may safely get, the Act of God * * * restraints of Princes and Rulers or People * * * excepted. * * * In case of blockade or interdict of the port of discharge, or if without such blockade or interdict, the Master shall consider it unsafe, for any reason, to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense; and on the goods being placed in charge of any mercantile agent or of British Consul, and a letter being put into the post-office addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the Master and owners discharged from all responsibility."

(2.) The loading of the said sulphur on board the

Styria was completed, and bills of lading therefor had been signed, on or before the 24th of April, 1898, the Master being ignorant up to that time that a state of war existed between the United States and Spain, but, in fact, on the 23rd of April, 1898, the Queen Regent of Spain had promulgated a royal decree, a copy of which is hereto annexed marked Exhibit "A" and made a part hereof, announcing that a state of war existed between Spain and the United States; that Spain intended to observe the principle that a neutral flag covers the enemy's goods, except contraband of war; that the Spanish Government proposed to organize a service of auxiliary cruisers of the Navy, for the purpose of cruising in co-operation with regular ships of war, and further providing that in order to confiscate the enemy's merchandise under their own flag, and contraband of war under any flag, the Royal Navy, auxiliary cruisers and privateers, if and when authorized, would exercise the right of visit on the high seas and in the territorial waters of the enemy, and defined contraband as follows:

"ART. VI.—Under the denomination contraband of war, the following articles are included:

"Cannons, machine guns, mortars, guns, all kinds of arms and fire arms, bullets, bombs, grenades, fuzes, cartridges, matches, powder, *sulphur*, saltpetre, dynamite, and every kind of explosive, articles of equipment like uniforms, straps, saddles and artillery and cavalry harness, engines for ships and their accessories, shafts, screws, boilers and other articles used in the construction, repair and arming of warships, and in general all warlike instruments, utensils, tools and other articles, and whatever may hereafter be determined to be contraband."

A formal declaration of war by the United States was also published on April 25th, 1898, but acts of war had been committed theretofore, and the declaration itself announced that a state of war had existed from and including April 21st, 1898.

On learning of the existence of war, and sulphur

had beendeclared contraband by the Spanish Government, the Master being informed that Spanish ships of war were cruising along the Spanish coast and in the Straits of Gibraltar, directly in the course of his intended voyage towards the port of New York, concluded it would be unsafe to carry the cargo to destination, and, therefore, determined to re land and store it at the port of Girgenti, in accordance with the above-quoted provision of the bill of lading.

The work of unloading and storing the cargo was begun on April 27th, and was completed at noon on the 7th of May, 1898.

All of the said sulphur was stored in the warehouse of Xenobio Urso, a qualified storekeeper at that port, and placed in charge of a mercantile agent named William Peirce. Letters were put into the Post Office, addressed to the shippers and consignees, stating that the goods had been landed on account of the war, and informing them of the place and circumstances of the deposit, and thereupon, as the claimant is informed and believes, the goods became and were at the shippers' risk and expense, and that the Master and owners were discharged from all responsibility therefor, by virtue of the above quoted clause in the bill of lading.

(3.) The course of the vessel on her voyage towards New York lay along the coast and by the lighthouses of Spain, and the presence of her naval vessels in her coast waters and in the Straits of Gibraltar, created a liability to capture, which amounted, or which the Master was justified in believing amounted to a restraint of princes and rulers or people, within the sense of that exception in the bill of lading.

(4.) The bill of lading further provided as follows:

"The shipowner is not to be liable for any damage to any goods which are capable of being covered by insurance."

The claimant is informed and believes that any loss

or damage which the libellants may have suffered in 41
the premises, was capable of being covered by insurance, and that, accordingly, under the aforesaid clause, the owners of the goods must be deemed to have assumed the risk of such loss or damage, and to have released the shipowner from all claim therefor, having recourse to insurance for their protection.

(5.) The bill of lading further provides:

"The shipowner is not to be liable * * * in any case for more than the invoice or declared value of 42
the goods, whichever shall be least."

The claimant avers that during the months of August and September, 1898, be brought forward the said sulphur in another vessel belonging to the same owners, under the terms of a stipulation with the libellants, a copy of which is hereto annexed, marked Exhibit "B" and made a part hereof, and delivered the same to the libellants at the port of New York, who duly accepted the same.

He is informed and believes that libellants have realized by the sale of the said sulphur, more than its 43
invoice price, and that, accordingly, under the above-quoted provision of the bill of lading, the libellants have not suffered any damages in the premises which are recoverable in this action.

(6.) Upon information and belief, the claimant alleges that by the Italian law which prevailed at the port of shipment, either party to a contract of carriage can withdraw from it without being liable for 44
damages when, before the vessel has left the jurisdiction, war has been declared, in consequence of which the vessel or the goods to be shipped according to the contract of affreightment can no longer be considered free, and would be liable to risk of capture.

In consequence of the declaration of war, and of the royal proclamation hereinbefore referred to, the cargo of the *Styria* could no longer be considered free, and was liable to risk of capture. The claimant, accordingly, was justified, under Italian law,

45 in withdrawing from the contract and re-landing and storing the cargo at the risk of and for the account of the shippers, and said vessel is not liable in damages for the acts of the master in so doing.

SEVENTH.—All and singular the premises of this answer are true.

Wherefore the claimant prays that the said libel may be dismissed with costs, or that such other decree may be made as the justice of the cause may require.

46

CONVERS & KIRLIN,
Proctors for Claimant.

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss.:

E. B. CONVERS, being duly sworn, says that he is one of the proctors for the claimant herein, and that the foregoing answer is true to the best of his knowledge, information and belief, derived from communi-
47 cations received from the owners of the vessel and their agents, and from the testimony of the master herein.

Deponent further says that the reason why this answer is not verified by the claimant is that he is absent from the United States.

E. B. CONVERS.

Sworn to before me this }
1st day of December, 1898. }

JAMES T. KILBRETH,
48 [SEAL.] Notary Public,
New York County.

Exhibit "A."

ROYAL DECREE.

In accordance with the advice of my Council of Ministers, in the name of my son, King Alfonso XIII, and as Queen Regent of the Kingdom,

I decree as follows:

ART. I.—The state of war existing between Spain and the United States terminates the Treaty of Peace and Friendship of the 27th October, 1795, the Protocol of the 12th January, 1877, and all other agreements, compacts, and conventions that have been in force up to the present between the two countries.

ART. II.—A term of five days from the date of the publication of the present Royal Decree in the Madrid Gazette is allowed to all United States ships anchored in Spanish ports, during which they are at liberty to depart.

ART. III.—Notwithstanding that Spain is not bound by the Declaration signed in Paris on the 16th April, 1856, as she expressly stated her wish not to adhere to it, my Government, guided by the principles of international law, intends to observe and hereby orders that the following regulations for maritime law be observed:

(*a.*) A neutral flag covers the enemy's goods, except contraband of war.

(*b.*) Neutral goods, except contraband of war, are not liable to confiscation under the enemy's flag.

(*c.*) A blockade to be binding must be effective; that is to say, maintained with a sufficient force to actually prevent access to the enemy's coast.

ART. IV.—The Spanish Government, while maintaining their right to issue letters of marque, which they expressly reserved in their note of the 16th May, 1857, in reply to the request of France for the adhesion of Spain to the Declaration of Paris relative to Maritime Law, will organize for the present a service

of "Auxiliary Cruisers of the Navy," composed of ships of the Spanish Mercantile Navy, which will co-operate with the latter for the purposes of cruising, and which will be subject to the statutes and jurisdiction of the navy.

ART. V.—In order to capture the enemy's ships, to confiscate the enemy's merchandise under their own flag, and contraband of war under any flag, the Royal Navy, auxiliary crusers, and privateers, if and when the latter are authorized, will exercise the right of visit on the high seas and in the territorial waters of the enemy, in accordance with international law and any regulations which may be publlshed for the purpose.

ART. VI.—Under the denomination contraband of war, the following articles are included:

Cannons, machine-guns, mortars, guns, all kinds of arms and fire-arms, bullets, bombs, grenades, fuzes, cartridges, matches, powder, sulphur, saltpetre, dynamite, and every kind of explosives, articles of equipment like uniforms, straps, saddles and artillery and cavalry harness, engines for ships and their accessories, shafts, screws, boilers and other articles used in the construction, repair and arming of war-ships, and in general all warlike instruments, utensils, tools, and other articles, and whatever may hereafter be determined to be contraband.

ART. VII.—Captains, Commanders and officers of non-American vessels or of vessels manned as to one-third by other than American citizens, captured while committing acts of war against Spain, will be treated as pirates, with all the rigor of the law, although provided with a license issued by the Republic of the United States.

ART. VIII.—The Minister of State and the Minister of Marine are charged to see the fulfilment of the present Royal Decree and to give the orders necessary for its execution.

MARIA CRISTINA.

Madrid, April 23, 1898.

Exhibit "B."

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MALCOLMSON *et al.*

AGAINST

The Steamship "STYRIA," etc.

MORGAN *et al.*

AGAINST

The Same.

PARSONS *et al.*

AGAINST

The Same.

MONROE *et al.*

AGAINST

The Same.

It is stipulated and agreed between the parties as follows:

1. The claimant shall forward the cargo landed *ex Styria*, at Port Empedocle, on the first available steamer from that port to New York, and shall deliver the same to the consignees, upon the terms and for the freight specified in the original bills of lading, the consignees to receive the same and to pay the agreed freight on right and true delivery; the goods upon

61 arrival to be sold at current market rates, and the proceeds, less charges incurred, to be credited on account of the damages, if any, recovered in these cases by the libellants.

2. The claimant shall have a lien on the portions of the cargo to be delivered to the several libellants for the respective amounts of the charges against the respective portions of the brimstone in Sicily, provided the claimant was justified in re-landing and storing the
62 cargo at Fort Empedocle as and when he did. If it be held that the re-landing and storage of the cargo was not justified, then the said brimstone shall be free from any lien on account of the aforesaid charges or expenses, except freight, which is provided for in paragraph first of this stipulation.

It is the purpose and intent of this paragraph of the stipulation, to provide that if the claimant was justified in re-landing and storing the cargo as and when he did, he shall have a lien upon the respective con-
63 signments for their respective proportions of the charges and expenses against the same, which the libellants would have had to pay (exclusive of the charges provided for in the first paragraph of this stipulation), if they undertook to forward the cargo for heir own account.

3. This stipulation and anything done by any party under it, shall be deemed to be wholly without prejudice in the pending suits, except as herein provided.

New York, August 12th, 1898.

64 SULLIVAN & CROMWELL,
Proctors for Malcolmson *et al.*
COWEN, WING, PUTNAM & BURLINGHAM,
Proctors for Morgan *et al.*
BOWERS & SANDS,
Proctors for Parsons *et al.*
STERN & RUSHMORE,
Proctors for Munroe *et al.*
CONVERS & KIRLIN,
Proctors for Steamship *Styria*.

[Endorsed:] —Answer filed, Dec. 1, 1898.

To the Honorable ADDISON BROWN, Judge of the District Court of the United States for the Southern District of New York: 65

The libel of Schuyler L. Parsons, of the City of New York, merchant, lawfully doing business therein according to the statute in such case made and provided, under the firm name of Parsons & Petit against the Steamship *Styria*, whereof A. G. Scopinich was and is master, her tackle, apparel and furniture, engines, boilers, etc., and all persons intervening for their 66
interests therein in a cause or contract civil and maritime, alleges as follows:

I.—That on or about the 21st day of April, 1898, Ferdinand Baller & Company of Messina, Sicily, in the Kingdom of Italy, shipped on board the said steamship then lying in the Port of Girgenti, in the Kingdom of Italy, and bound to the Port of New York, in good order and well-conditioned, to be carried and transported in said steamship to the Port of New York and 67
delivered to the order of Hambro, 3250 cantars of crude brimstone in bulk, in like good order for the freight of six shillings per ton of 2000 pounds as delivered and average accustomed, to be paid by the libellant and the said Ferdinand Baller & Company receiving thereon from the said master three bills of lading, receipts and contracts, all of even tenor and date, one of which being accomplished, the other to stand void, whereby and wherein the said master charged his body and goods and also the said vessel, 68
her tackle, apparel and furniture for the performance of the said contract, a copy of which is hereto annexed.

II.—That at the same time and place aforesaid the said Ferdinand Baller & Company shipped on board the said steamship consigned to order 1300 cantars of crude brimstone in bulk to be carried as aforesaid for the freight of 7 shillings and 6d. per ton of 2000 pounds delivered and the said Ferdinand Baller & Com-

69 pany receiving therefor from the said master three bills of lading, also as above, a full copy of which is not hereto annexed, but is in the same form as that referred to in the last preceding paragraph, except as to the rate of freight and amount of goods shipped and that the said bill of lading is drawn to order in blank.

III.—That thereafter for value received the said Hambro, to wit, meaning thereby the banking firm of C. J. Hambro & Son, of London, England, duly en-
70 dorsed the first of said bills of lading in blank, and the said Ferdinand Baller duly endorsed the second of said bills of lading in blank, and the same were thereupon delivered to the libellant who became the lawful owner and holder thereof.

IV.—That the said steamship sailed from the said port of Girgenti for the port of New York where she arrived on the 3rd day of June, 1898, and now is, but notwirhstanding the libellant has been at all times
71 ready and willing and still is ready and willing to receive the said merchandise in good order and on so receiving the same to pay the freight thereon, yet the said master has not delivered the said merchandise to the libellant.

V..—That the libellant has demanded of the master of said vessel delivery of the said goods, tendering him the said bills of lading and also all the lawful charges thereon for freight and otherwise, but the said master has neglected and refused to deliver the said goods and
72 has converted the same to his own use, whereby the libellants has sustained damages to the amount of the value of the said goods, to wit, the sum of 11,200 dollars and interest thereon from the 21st day of April, 1898.

VI.—That the said steamship is a foreign vessel and is now soon to leave this port and the United States, and the said master has refused and refuses to pay said damage or deliver such merchandise so that the libellant will be without remedy, unless by proceed-

ings against said vessel, her tackle, apparel, furniture, 73
boilers and engines.

VII.—That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that process in due form of law according to the course of this Court in case of admiralty and maritime jurisdiction may issue against the said master and against the said steamship, her tackle, apparel, furniture, engines and boilers, and that 74
all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court will be pleased to decree the payment of the damages aforesaid with costs, and that the said vessel may be condemned and sold to pay the same, and that the libellant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

75

BOWER & SANDS,
Proctors for Libellants,
31 Nassau Street,
N. Y. City.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:
City of New York,

SCHUYLER L. PARSONS, being duly sworn, says that he is the libellant named in the foregoing libel; that he has read the same and knows the contents thereof, 76
and that the same is true according to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that, as to those matters, he believes it to be true.

SCHUYLER L. PARSONS.

Sworn to before me this 6th day of June, 1898.

WILLIAM C. BOWERS,
Notary Public,
N. Y. Co.

77 Shipped in apparent good order and condition, by Ferd. Baller & Co. in and upon the steamship called the *Styria*, whereof A. G. Scopinich is master for this present voyage, and now lying in the port of Girgenti and bound for New York with liberty to call at any port or ports, in any rotation in the Mediterranean, Adriatic and adjacent seas, or on the coasts of Spain or Portugal or in the Azores, or in North America for the purpose of receiving and delivering coals, cargo or passengers, or for any other purpose whatsoever; to sail
78 with or without pilots; to tow and assist vessels in all situations, although deviating thereby from the voyage and to carry goods of all kinds, dangerous or otherwise, and with liberty to tranship any part of the cargo by steamer.

Crs. 3,250 crude brimstone best seconds unmixed in bulk.

Say cantars three thousand two hundred and fifty. Said to be marked and numbered as per margin, and to be delivered from the ship's deck, where the ship's
79 responsibility shall cease, in the like good order and condition, at the aforesaid port of New York or so near thereunto as she may safely get, the act of God, the Queen's enemies, pirates, robbers by land or sea, jettison, thieves, vermin, barratry of master or mariners, restraints of princes and rulers or people, loss or damage resulting from any of the following perils, whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedore, or other persons in the service of the ship or
80 any other ship or ships belonging to or sailing under the flag of the company or otherwise, namely: Risk of literage to or from the vessel, or of craft or hulk or transshipment, explosion, heat, or fire at sea, in craft or hulk, or on shore, bursting of boilers, unseaworthiness arising from breakage of shafts or any latent defect in hull, machinery or appurtenances, or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused, collision, stranding, straining, or other perils of the seas, rivers, navigation or land, transit of whatever nature

or kind soever and howsoever caused, excepted, with 81
liberty (in event of steamer putting back to this or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or tranship the goods by any other steamer, and with liberty to proceed under sail or in tow of any other manner which the ship's owner may think fit, unto

order Hambro,

or to his or their assign, he or they paying freight, the shipper also remaining liable for the same, for the en- 82
tire quantity of goods therein enumerated, whether delivered sound or unsound, in cash, free of interest, on the ship's delivery, at and after the rate of six shillings and pence British sterling in full per ton of 20 cwt. delivered with per cent. primage and average accustomed, or the equivalent thereof, payable in cash, without discount, at the rate of exchange current on the day of the ship's arrival for banker's sight bills on London. Any average that may arise on the voyage to be adjusted according to York and Antwerp 83
rules, weight, measurement, gauge, contents, quantity, quality condition, brand and value unknown, and not accountable for loss or damage resulting from stowage, sweating, leakage, breakage, pilferage, wastage, rust, decay, rain, spray frost, thaw, effect of climate or heat of hold, bursting of bags, damage by rats, deterioration in quality, defects, slightness or insufficiency of packages, contact with or smell or evaporation from any other goods, nor for incorrect delivery of goods, arising from inaccuracies, obliteration, insufficiency or 84
absence of marks or numbers, or from any such being incorrectly stated in this bill of lading, or injury to wrappers however caused.

If said goods be of a perishable nature, such as green fruit, the consignee, his agents or assigns, shall claim the same and pay the freight thereon within forty-eight hours after the same is ready for delivery, and in default thereof the charterers or their assigns may, at their option, sell such goods at public auction for

85 account and risk of whom it may concern, and apply th proceeds of such sale as follows: to pay the expenses of such sale and all freight, custom dues, and other charges properly chargeable to said goods, and to hold the overplus, if any, for account of whom it may concern, and if said proceeds shall not be sufficient to pay said freight, expenses, duty and other charges, such sale shall not prejudice the rights of the charterers to enforce collection of the remainder. Goods will be held free of charge for primage for five days from entry
86 of steamer at custom house. A charge for primage of one third (1/3) of one cent per box per day will be collected for each box for every day held thereafter until and including the day of delivery. Not accountable for loss or damage caused by heating machinery, if any, or connection thereof on dock where goods shall be discharged.

All fines, expenses, losses or damage which the shipowner or his agents, or servants, or the ship or cargo may incur or suffer on account of incorrect or insuffi-
87 cient marking of the packages, or description of their contents, or the dangerous nature of such contents, shall be paid by the shipper or consignee, as may be required, and the shipowner shall have a lien upon the goods for the payment thereof.

Simultaneously with the ship being ready to unload the above mentioned goods, or any part thereof, the consignee of the said goods is hereby bound to be ready to receive the same from the ship's side, either on the wharf or quay at which the ship may lie for discharge,
88 or into lighters provided with a sufficient number of men to receive and stow the said goods therein, and in default thereof the master or Agent of the ship, and the Collector of above port, are hereby authorized to enter the said goods at the Custom House, and land, warehouse or place them in lighters without notice to, and at the risk and expense of the said consignee of the goods after they leave the deck of the ship. The Collector of the Port of Discharge being hereby authorized to grant a general

order for discharge immediately after entry of the ship. 89

The captain or owner has a lien on the goods for unpaid freights, through freight, average claims, or liabilities incurred in respect of any charges stipulated herein, to be borne by the owners of the goods. Freight on perishable goods to be paid by the shipper or consignee, in whatever condition they may be delivered; freight, if payable by shippers, is due in full in exchange for bill of lading, and to be considered as earned, ship lost or not lost, and if payable by 90 consignee on arrival of goods at place of destination, in exchange for delivery order, settlement in either case to be made without discount or abatement. Freight on goods to order, liquids and brittle or perishable goods payable by shippers if required.

The Shipowner is not liable for any damage to any goods which are capable of being covered by insurance nor for any claim, notice of which is not given before the removal of the goods, nor for claim for damage or detention to goods under through bills of lading where 91 the damage is done or detention occurs whilst the goods are not in the possession of the shipowner, nor in any case for more than the invoice or declared value of the goods, whichever shall be the least. Not accountable to any extent for gold or silver, manufactured or unmanufactured, or in shape of coin, plated articles, glass, china, jewelry, precious stones, trinkets, nor for any highly valued goods, unless the value be herein expressed and extra freight, as may be agreed on, be paid. 92

The only condition on which glass will be carried is that the shipowner will not be held liable for any breakage which may occur, however caused.

Shippers will be held accountable for all damage caused by goods of an inflammable, explosive or otherwise dangerous character, shipped without permission or without full disclosure of their nature, whether such shippers shall be aware thereof or not, and whether such shippers shall be principals or agents only, and such goods may be seized and confiscated or destroyed

by the shipowner at any time before delivery, without any compensation to the shipper or consignee.

This bill of lading, duly endorsed, to be given in exchange for delivery order.

In case of blockade or interdict of the port of discharge, or if, without such blockade or interdict, the Master shall consider it unsafe for any reason to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense, and on the goods being placed in charge of any mercantile agent, or of British Consul, and a letter being put into the Post Office, addressed to the Shipper and Consignee, if named, stating the landing and with whom deposited, the goods to be at the Shipper's risk and expense, and the Masters and Owners discharged from all responsibility.

In the event of Quarantine, the goods te be discharged on arrival into Quarantine Depot, Hulk, Lighter, or other vessel, necessary for the ship's despatch, at the Consignee's risk and expense; or should this be impracticable, or the vessel not admitted, or should communication subject the Steamer to Quarantine, at a subsequent port of call, the Master to have the option, and is hereby authorized, to land the cargo at the nearest safe port to which the vessel is bound, at the risk and expense of the Consignees; and on the Goods being placed in charge of any Mercantile Agent, or of the British Consulate, a letter being put into the Post Office, addressed to the Shipper and Consignee, if named, stating the landing and with whom deposited, the Goods to be at the Shipper's risk and expense, and the Master and Owners discharged from all responsibility.

Notice —In accepting this Bill of Lading, the Shipper or other Agent of the Property carried, expressly accepts and agrees to all, its stipulations, exceptions, and conditions, whether written or printed.

In Witness whereof the Master or Agent of the said Ship hath affirmed to three Bill of Landing, all of this

tenor and date, the one of which Bill being accom- 97
plished, the others to stand void.

Not accountable for wrong marks or numbers.

Dated in Girgenti this 21st April, 1898.

Weight and quality unknown.

ANTONIO G. SCOPINICH,
Master.

With liberty either before or after proceeding to-
wards the port of discharge, to proceed to and stay at
any ports or places whatsoever (although in a contrary 98
direction to, or out of, or beyond, the route to the said
port of discharge) once or oftener, in any other back-
wards or forwards for loading or discharging cargo or
passengers, or for any other purpose whatsoever, and
all such ports and places, and sailings shall be deemed
included within the intended voyage. This liberty is
not to be considered as restricted by any words in this
contract, whether written or printed.

Said to be marked as per margin, it is specially
stipulated that no claim is to be made by the Shipper 99
or receiver for any loss arising from difference in marks
or contents.

If during the winter season the within mentioned
goods are discharged at a dock fitted with heating
machinery, a charge of 1/3 of one cent (United States
currency) per box per day will be levied on all boxes
(accidents to machinery, etc., always excepted).

[Endorsed on margin.]—1493, I. & V. Florio, Pal-
ermo.—(Flag.)—Transoceanic Line.—William J.
Peirce, Agent. — Girgenti-Porto Empedocle.— 100
Stowed in between deck amidship.—A. G. S.

[Endorsed :]—Hambro.— ——Illegible.—Freight L's.

[Endorsed :]—Libel filed June 6, 1898.

101 To the Honorable ADDISON BROWN, United States District Judge, for the Southern District of New York:

The answer of Antonio G. Scopinich, claimant of the Steamship *Styria*, to the libel of Schuyler L. Parsons against the said steamship, in a cause of contract, civil and maritime, alleges as follows:

FIRST.--He admits that on or before the 21st day of April, 1898, Ferdinand Baller & Co., of Messina,
102 Sicily, shipped on board said steamship then lying in the port of Girgenti, in the Kingdom of Italy, and bound for the port of New York, a consignment of brimstone, otherwise known as sulphur, said to weigh 3,250 cantars, to be delivered at the port of New York, or as near thereto as the steamer could safely get with the said cargo, to the order of Hambro, on payment of the freight, and upon the terms and conditions in the bills of lading, of which a copy, showing the form, is annexed to the libel.

103 He denies any knowledge or information sufficient to form a belief as to the other matters alleged in the first article of the libel.

SECOND.—He admits that at the time and place aforesaid, Ferdinand Baller & Co. shipped on board said steamship, consigned to order, another lot of brimstone, otherwise called sulphur, said to weigh 1,300 cantars, and that the master delivered bills of lading therefor, undertaking to deliver the same at the port
104 of New York, or as near thereto as the steamer could safely get with the said cargo, unto order, on payment of the freight of seven shillings and sixpence per ton of 2,000 lbs., and upon the other terms and conditions contained in said bill of lading, copy of which is annexed to the libel.

He denies any knowledge or information sufficient to form a belief as to the other matters alleged in the second article of the libel.

THIRD.—Claimant has no knowledge or information

of the matters alleged in the third article of the libel, 105
and requires proof thereof.

FOURTH.—He admits that the steamship afterwards sailed and proceeded to the port of New York, arriving on or about the 3rd day of June, 1898, but did not then and there deliver the said sulphur unto the libellant.

He denies any knowledge or information sufficient to form a belief with regard to the other matters alleged in the fourth article of the libel. He further 106
says that by reason of the outbreak of war between Spain and the United States, and the declaration of the Government of Spain that sulphur was contraband of war, it became, in his judgment, unsafe to transport the said cargo past the coast of Spain and through the Straits of Gibraltar to New York, and that, accordingly, he re-landed and stored the cargo at the port of shipment, on due notice to the shippers, and that he was justified, under the circumstances, in so doing.

FIFTH.—Upon information and belief he denies the 107
matters alleged in the fifth article of the libel.

SIXTH.—He admits that the steamship is a foreign vessel, and at the time of the filing of the libel was bound on a voyage to sea, but denies the other matters alleged in the sixth article of the libel.

SEVENTH.—He admits the jurisdiction of the Court, but denies the other matters in the seventh article of the libel alleged. 108

EIGHTH.—Further answering the said libel, and for a further and separate defense thereto, claimant alleges as follows:

(1.) That the bills of lading under which the said brimstone, otherwise called "sulphur," was carried, provided it was to be delivered "at the aforesaid port of New York, or so near thereunto as she may safely get, the Act of God * * * restraints of Princes and Rulers or People * * * excepted * * * In case

of blockade and interdict of the port of discharge, or if without such blockade or interdict, the master shall consider it unsafe, for any reason, to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense ; and on the goods being placed in charge of any mercantile agent or of British Consul, and a letter being put into the Post Office addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the master and owners discharged from all responsibility."

(2.) The loading of the said sulphur on board the *Styria* was completed, and bills of lading therefor had been signed on or before the 24th of April, 1898, the master being ignorant up to that time that a state of war existed between the United States and Spain, but, in fact, on the 23d of April, 1898, the Queen Regent of Spain had promulgated a royal decree; a copy of which is hereunto annexed marked Exhibit "A," and made a part hereof, announcing that a state of war existed between Spain and the United States ; that Spain intended to observe the principle that a neutral flag covers the enemy's goods, except contraband of war ; that the Spanish Government proposed to organize a service of auxiliary cruisers of the Navy, for the purpose of cruising in co operation with regular ships of war, and further providing that in order to confiscate the enemy's merchandise under their own flag, and contraband of war under any flag, the Royal Navy, auxiliary cruisers and privateers, if and when authorized, would exercise the right of visit on the nigh seas, and in the territorial waters of the enemy, and defined contraband as follows :

"ART. VI.—Under the denomination contraband of war, the following articles are included :

"Cannons, machine-guns, mortars, guns, all kinds of arms and fire-arms, bullets, bombs, grenades, fuzes, cartridges, matches, powder, *sulphur*, saltpetre, dynamite, and every kind of explosive, articles of equipment like uniforms, straps, saddles and artillery and cavalry

harness, engines for ships and their accessories, shafts, 113
screws, boilers and other articles used in the construction, repair and arming of war-ships, and in general all warlike instruments, utensils, tools and other articles, and whatever may hereafter be determined to be contraband."

A formal declaration of war by the United States was also published on April 25th, 1898, but acts of war had been committed theretofore and the declaration itself announced that a state of war had existed from and including April 21st, 1898. 114

On learning of the existence of war, and that sulphur had been declared contraband by the Spanish Government, the master being informed that Spanish ships of war were cruising along the Spanish coast and in the Straits of Gibraltar, directly in the course of his intended voyage towards the port of New York, concluded it would be unsafe to carry the cargo to destination, and, therefore, determined to reland and store it at the port of Girgenti, in accordance with the above quoted provision of the bills of lading. 115

The work of unloading and storing the cargo was begun on April 27th, and was completed at noon on the 7th of May, 1898.

All of the said sulphur was stored in the warehouse of Xenoble Urso, a qualified storekeeper at that port, and placed in charge of a mercantile agent named William Peirce. Letters were put into the Post Office addressed to the shippers and consignees, stating that the goods had been landed on account of the war, and informing them of the place and circumstances of the 116
deposit, and thereupon, the claimant is informed and believes, the goods became and were at the shippers' risk and expense, and that the master and owners were discharged from all responsibility therefor by virtue of the above quoted clause in the bills of lading.

(3.) The course of the vessel on her voyage toward New York lay along the coast and by the lighthouses of Spain, and the presence of her naval vessels in her coast waters and in the Straits of Gibraltar created a

117 liability to capture which amounted, or which the master was justified in believing amounted, to a restraint of princes and rulers or people within the sense of that exception in the bills of lading.

(4.) The bills of lading further provided as follows:

"The shipowner is not to be liable for any damage to any goods which are capable of being covered by insurance."

The claimant is informed and believes that any loss
118 or damage which the libellant may have suffered in the premises was capable of being covered by insurance, and that, accordingly, under the aforesaid clause, the owners of the goods must be deemed to have assumed the risk of such loss or damage, and to have released the shipowner from all claim therefor, having recourse to insurance for their protection.

(5) The bills of lading further provided:

"The shipowner is not to be liable * * * in
119 any case for more than the invoice or declared value of the goods, whichever shall be least."

The claimant avers that, during the months of August and September, 1898, he brought forward the said sulphur in another vessel belonging to the same owners under the terms of a stipulation with the libellant, a copy of which is hereto annexed, marked Exhibit B, and made a part hereof, and delivered the same to the libellant at the port of New York, who duly accepted the same.

120 He is informed and believes that libellant has realized by the sale of the said sulphur more than its invoice price, and that, accordingly, under the above quoted provision of the bills of lading, the libellant has not suffered any damages in the premises which are recoverable in this action.

(6.) Upon information and belief, the claimant alleges that, by the Italian law, which prevailed at the port of shipment, either party to a contract of carriage can withdraw from it without being liable for damages

when, before the vessel has left the jurisdiction, war has been declared, in consequence of which the vessel or the goods to be shipped according to the contract of affreightment, can no longer be considered free, and would be liable to capture. 121

In consequence of the declaration of war, and of the royal proclamation heretofore referred to, the cargo of the *Styria* could no longer be considered free, and was liable to risk of capture. The claimant, accordingly, was justified, under Italian law, in withdrawing from the contract, and relanding and storing the cargo at the risk of and for the account of the shippers, and said vessel is not liable in damages for the acts of the master in so doing. 122

NINTH—All and singular the premises of this answer are true.

Wherefore, the claimant prays that the said libel may be dismissed with costs, or that such other decree may be made as the justice of the cause may require. 123

CONVERS & KIRLIN,
Proctors for Claimant.

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss.:

E. B. CONVERS, being duly sworn, says that he is one of the proctors for the claimant herein, and that the foregoing answer is true to the best of his knowledge, information and belief, derived from communications received from the owners of the vessel and their agents, and from the testimony of the master herein. 124

Deponent further says that the reason why this answer is not verified by the claimant is that he is absent from the United States.

E. B. CONVERS.

Sworn to before me this 1st day of December, 1898.

JAMES T. KILBRETH,
[SEAL.] Notary Public,
New York County.

125 Exhibits A and B annexed to foregoing answer, being the same as Exhibits A and B annexed to answer in suit of Morgan *v. Styria*, are omitted here by consent.

[Endorsed]:—Answer filed December 1, 1898.

To the Honorable ADDISON BROWN, Judge of the Dis-
126 trict Court of the United States, for the Southern District of New York:

The libel of ALFRED S. MALCOMSON, of the City of New York, merchant, against the Steamship *Styria* whereof Antonio G. Scopinich was and is Master, her engines, boilers, tackle, apparel and furniture, and all persons intervening for their interest therein in a cause of action, civil and maritime, alleges as follows:

FIRST.—That some time in the month of April, 1898,
127 Emil Fog & Sons shipped on board said steamer then lying in the Port of Girgenti in Sicily, in the Kingdom of Italy, and bound for the Port of New York, in good order and well conditioned, to be carried and transported in said steamer to the Port of New York, and delivered in like good order to the Canadian Bank of Commerce, fifteen hundred tons of brimstone, in bulk, for the freight of six shillings, British sterling, per ton of twenty hundred weight, delivered in full, the said Emil Fog and Sons receiving therefor from the said Master
128 bills of lading, receipts and contracts whereby and wherein the said Master charged his body and goods, and also the said vessel, her engines, boilers, tackle, apparel and furniture, for the performance of said contract, a copy of which is hereto annexed.

SECOND.—That said goods were the property of this libellant, and that before the arrival of the said vessel at said Port of New York, the said bills of lading, receipts and contracts were by said Canadian Bank of Commerce duly assigned and endorsed to libellant.

THIRD.—That said steamship sailed from the said Port of Girgenti for the Port of New York, where she arrived on or about the third day of June, 1898, and now is, but notwithstanding the libellant has been at all times ready and willing to receive the said merchandise, and on so receiving the same to pay the freight thereon, yet the said Master has not yet delivered the said merchandise to the libellant, but to deliver the same has refused and still does refuse, whereby the libellant has been damaged to the amount of Fifty thousand dollars. 129 130

FOURTH.—That said steamship is a foreign vessel, and is discharging cargo and is about to leave this Port, and the United States, and the said Master has refused and refuses to deliver the said merchandise, so that the libellant will be without remedy, unless by proceedings against said vessel, her engines, boilers, tackle, apparel and furniture.

FIFTH.—That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. 131

Wherefore, the libellant prays that process in due form of law according to the course of this Court in cases of admiralty and maritime jurisdiction, may issue against the said Master and against the said steamship, her engines, boilers, tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court would be 132 pleased to decree the payment of the damages aforesaid, with costs, and that the said vessel may be condemned and sold to pay the same, and that the libellant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

SULLIVAN & CROMWELL,
Proctors for Libellants,
45 Wall Street,
New York City.

133 SOUTHERN DISTRICT OF NEW YORK, } ss.:
City and County of New York, }

ALFRED S. MALCOLMSON, being duly sworn, says that he is the above named libellant, and that the foregoing libel is true, of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

ALFRED S. MALCOLMSON.

134 Sworn to before me this }
4th day of June, 1898. }

HENRY C. KENNEDY,
Notary Public,
Kings Co.

Cert. filed N. Y. Co.

[Endorsed:]—Libel filed June 4, 1898.

Shipped in apparent good order and condition by T. V. Florio in and upon the steamship called the
135 *Styria*, whereof A. G. Scopinich is master for this present voyage, and now lying in the Port of Girgenti and bound for New York with liberty to call at any port or ports, in any rotation in the Mediterranean, Adriatic and adjacent seas, or on the coasts of Spain or Portugal or in the Azores, or in North America for the purpose of receiving and delivering coals, cargo or passengers, or for any other purpose whatsoever; to sail with or without pilots; to tow and assist vessels in all situations, although deviating thereby from the
136 voyage and to carry goods of all kinds, dangerous or otherwise, and with liberty to tranship any part of the cargo by steamer,

Sicilian cantars 13,000 Crude Brimstone, best second quality unmixed. Said to be marked and numbered as per margin, and to be delivered from the ship's deck, where the ship's responsibility shall cease, in the like good order and condition, at the aforesaid Port of New York, or so near thereunto as she may safely get. The Act of God, the Queen's enemies, pirates, robbers by land or sea, jettison, thieves, vermin, barratry of master or mariners, restraints of princes and rulers

or people, loss or damage resulting from any of the 137
following perils, whether arising from the negligence, default or error in judgment of the pilot, master, mariners, engineers, stevedore, or other persons in the service of the ship or any other ship or ships belonging to or sailing under the flag of the company or otherwise, namely : Risk of lighterage to or from the vessel, or of craft or hulk or transhipment, explosion, heat, or fire at sea, in craft or hulk, or on shore, burst ing of boilers, unseaworthiness arising from breakage of shafts or any latent defect in hull, machinery, ap- 138
purtenances, or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused, collision, stranding, straining or other perils of the seas, rivers, navigation or land, transit of whatever nature or kind soever, and howsoever caused, excepted, with liberty (in event of steamer putting back to this or into any other port or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or tranship the goods by any other steamer, and with 139
liberty to proceed under sail or in tow of any other manner which the ship's owner may think fit unto.

Order of Canadian Bank of Commerce.

or to his or their assign, he or they paying freight, the shipper also remaining liable for the same, for the entire quantity of goods therein enumerated, whether delivered sound or sound, in cash, free of interest on the ship's delivery, at and after the rate of six shillings and sixpence British sterling p. ton of 20 cwt. deliv- 140
ered in full and average accustomed ; or the equivalent thereof, payable in cash, without discount, at the rate of exchange current on the day of the ship's arrival for banker's sight bills on London. Any average that may arise on the voyage to be adjusted according to York and Antwerp rules –freight, measurement, gauge, contents, quantity, quality, condition, brand and value unknown, and not accountable for loss or damage resulting from stowage, sweating, leakage, breakage, pilferage, wastage, rust, decay, rain, spray frost, thaw, effect of climate or heat of hold, bursting of bags, dam-

141 age by rats, deterioration in quality, defects, slightness or insufficiency of packages, contact with or smell or evaporation from any other goods, nor for incorrect delivery of goods arising from inaccuracies, obliteration, insufficiency or absence of marks, or numbers, or from any such being incorrectly stated in this bill of lading, or injury to wrappers however caused.

If said goods be of a perishable nature. such as green fruit, the consignee, his agents or assigns, shall claim the same and pay the freight thereon within forty-
142 eight hours after the same is ready for delivery, and in default thereof the charterers or their assigns may, at their option, sell such goods at public auction for account and risk of whom it may concern, and apply the proceeds of such sale as follows: to pay the expenses of such sale and all freight, custom dues, and other charges properly chargeable to said goods, and to hold the overplus, if anv, for account of whom it may concern, and if said proceeds shall not be sufficient to pay said freight, expenses,
143 duty and other charges, such sale shall not prejudice the rights of the charterers to enforce collection of the remainder. Goods will be held free of charge for primage for five days from entry of steamer at Custom House. A charge for primage of one third ($\frac{1}{3}$) of one cent per box per day will be collected for each box, for every day held thereafter until and including the day of delivery. Not accountable for loss or damage caused by heating machinery, if any, or connection thereof on dock, where goods shall be discharged.

144 All fines, expenses, losses or damage which the shipowner or his agents or servants, or the ship, or cargo may incur or suffer on account of incorrect or insufficient marking of the packages, or description of their contents, or the dangerous nature of such contents shall be paid by the shipper or consignee, as may be required, and the shipowner shall have a lien upon the goods for the payment thereof.

Simultaneously with the ship being ready to unload the above-mentioned goods or any part thereof, the consignee of the said goods is hereby bound to be ready to receive the same from the ship's side, either

on the wharf or quay at which the ship may lie for 145
discharge, or into lighters provided with a sufficient number of men to receive and stow the said goods therein, and in default thereof, the Master or agent of the ship, and the Collector of above port are hereby authorized to enter the said goods at the Custom House, and land, warehouse, or place them in lighters without notice to, and at the risk and expense of the said consignee of the goods after they leave the deck of the ship. The Collector of the port of discharge being hereby authorized to grant a general order for 146
discharge immediately after entry of the ship.

The captain or owner has a lien on the goods for unpaid freights, through freight, average claims, or liabilities incurred in respect of any charges stipulated herein, to be borne by the owners of the goods. Freight on perishable goods to be paid by the shipper or consignee, in whatever condition they may be delivered, freight, if payable by shippers, is due in full in exchange for bill of lading and to be considered as earned, ship lost or not lost, and if payable by con- 147
signee on arrival of goods at place of destination, in exchange for delivery order, settlement in either case to be made without discount or abatement. Freight on goods to order, liquids and brittle or perishable goods payable by shippers if required.

The shipowner is not to be liable for any damage to any goods which are capable of being covered by insurance nor for any claim, notice of which is not given before the removal of the goods, nor for claim for damage or detention to goods under through 148
bills of lading where the damage is done or detention occurs whilst the goods are not in the possession of the shipowner, nor in any case for more than the invoice or declared value of the goods, whichever shall be the least. Not accountable to any extent for gold or silver, manufactured or unmanufactured ; or in shape of coin, plated articles, glass, china, jewelry, precious stones, trinkets nor for any other highly valued goods, unless the value be herein expressed and extra freight, as may be agreed on be paid.

The only condition on which glass will be carried is

that the shipowner will not be held liable for any breakage which may occur, however caused.

Shippers will be held accountable for all damage caused by goods of an inflammable, explosive or otherwise dangerous character, shipped without permission or without full disclosure of their nature whether such shippers shall be aware thereof or not and whether such shippers shall be principals or agents only, and such goods may be seized and confiscated or destroyed by the shipowner at any time before delivery, without any compensation to the shipper or consignee.

This bill of lading, duly endorsed to be given in exchange for delivery order.

In case of blockade or interdict of the Port of Discharge, or if, without such blockade or interdict, the Master shall consider it unsafe for any reason to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense, and on the goods being placed in charge of any Mercantile Agent, or of British Consul, and a letter being put into the Post Office, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the master and owners discharged from all responsibility.

In the event of Quarantine, the goods to be discharged on arrival into Quarantine depot, hulk, lighter, or other vessel, necessary for the ship's despatch, at the consignee's risk and expense; or should this be impracticable, or the vessel not admitted, or should communication subject the steamer to Quarantine at a subsequent port of call, the master to have the option, and is hereby authorized to land the cargo at the nearest safe port to which the vessel is bound, at the risk and expense of the consignees, and on the goods being placed in charge of any Mercantile Agent, or of the British Consulate, a letter being put into the Post Office, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the master and owners discharged from all responsibility.

NOTICE.—In accepting this bill of lading the shipper 153
or other agent of the property carried expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written or printed.

In witness whereof the master or agent of the said ship hath affirmed to three bill of lading, all of this tenor and date, the one of which bill being accomplished, the others to stand void.

Not accountable for wrong marks or numbers.

Dated in Girgenti this 24th April, 1898.

Weight and quantity unknown. 154

ANTONIO G. SCOPINICH,
Master.

With liberty either before or after proceeding towards the port of discharge to proceed to and stay at, any ports or places whatsoever (although in a contrary direction to, or out of, or beyond, the route to the said port of discharge) once or oftener, in any other backwards or forwards for loading or discharging cargo or passengers, or for any other purpose whatsoever, and all such ports and places, and sailings 155
shall be deemed included within the intended voyage. This liberty is not to be considered as restricted by any words in this contract, whether written or printed.

Said to be marked as per margin, it is specially stipulated that no claim is to be made by the shipper or receiver for any loss arising from difference in marks or contents.

If during the Winter season the within mentioned goods are discharged at a dock fitted with heating machinery, a charge of 1/3 of one cent (United States 156
currency) per box per day will be levied on all boxes (accidents to machinery, etc., always excepted).

[Endorsed on Margin :]—I. & V. Florio, Palermo.—(Flag).—Transoceanic Line, William J. Peirce, Agent, Girgenti, Porto Empedocle.—En. Crs., 13,000.—Hold No. 2 (two).—A. G. S.—The second bill of lading annexed to the foregoing libel being in the same form as the foregoing is annulled by consent.—Freight L's.

[Endorsed :]—Libel filed June 4. 1898.

157 To the Honorable ADDISON BROWN, United States District Judge, for the Southern District of New York:

The answer of Antonio G. Scopinich, claimant of the Steamship *Styria*, to the libel of Alfred S. Malcolmson, against the said steamship, in a cause of contract, civil and maritime, alleges as follows:

FIRST.—He admits that in the month of April, 1898, Emil Fog & Sons shipped on board said steamship,
158 then lying in the port of Girgenti, Italy, and bound on a voyage to New York, a consignment of brimstone, otherwise known as "sulphur," said to weigh 1500 tons, to be delivered at the port of New York, or as near thereunto as the steamer could safely get with the said cargo, to the order of the Canadian Bank of Commerce, on payment of the freight, and upon the other terms and conditions stated in the bills of lading delivered by the Master, a copy of which is annexed to the libel.

159 He denies any knowledge or information as to the other matters alleged in the first article of the libel, and requires proof thereof.

SECOND.—He has no knowledge or information as to the matters alleged in the second article of the libel, and requires proof thereof.

THIRD.—He admits that the steamship afterwards sailed and proceeded to the port of New York, arriv-
160 ing on or about the third day of June, 1898, but did not then and there deliver the said sulphur unto the libellant.

He denies any knowledge or information sufficient to form a belief, with regard to the other matters alleged in the third article of the libel. He further says that by reason of the outbreak of war between Spain and the United States, and the declaration of the Government of Spain that sulphur was contraband of war, it became, in his judgment, unsafe to transport the said cargo past the coast of Spain and

through the Straits of Gibraltar to New York, and 161
that, accordingly, he re-landed and stored the cargo at the port of shipment, on due notice to the shippers, and that he was justified, under the circumstances, in so doing.

FOURTH.—He admits that the steamship is a foreign vessel, and that at the time of the filing of the libel, was about to leave port, and, except as otherwise admitted herein, he denies the remaining matters alleged in the fourth article of the libel. 162

FIFTH.—He admits the jurisdiction of the Court, but denies the other matters alleged in the fifth atticle of the libel.

SIXTH.—Further answering the said libel, and for a further and separate defense thereto, claimant alleges as follows:

(1.) That the bills of lading under which the said brimstone, otherwise called "sulphur," was carried, provided that it was to be delivered "at the aforesaid 163
port of New York, or so near thereunto as she may safely get, the Act of Cod * * * restraints of Princes and Rulers of People * * * excepted * * *. In case of blockade or interdict of the port of discharge, or if without such blockade or interdict, the Master shall consider it unsafe, for any reason, to enter or discharge cargo there, he is to have option of landing the goods at any port which he may consider safe, at shipper's risk and expense; and on the goods 164
being placed in charge of any mercantile agent or of British Consul, and a letter being put into the post office addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the Master and owners discharged from all responsibility."

(2.) The loading of the said sulphur on board the *Styria* was completed, and bills of lading therefor had been signed, or or before the 24th of April 1898, the Master being ignorant up to that time that a state of

165 war existed between the United States and Spain, but, in fact, on the 23rd of April, 1898, the Queen Regent of Spain had promulgated a royal degree, a copy of which *is hereto annexed and marked Exhibit "A"* and made a part hereof, announcing that a state of war existed between Spain and the United States; that Spain intended to observe the principle that a neutral flag covers the enemy's goods, except contraband of war; that the Spanish Government proposed to organize a service of auxiliary cruisers of the navy, for the
166 purpose of cruising in co operation with regular ships of war, and further providing that in order to confiscate the enemy's merchandise under their own flag, and contraband of war under any flag, the Royal Navy, auxiliary cruisers and privateers, if and when authorized, would exercise the right of visit on the high seas and in the territorial waters of the enemy, and defined contraband as follows:

"Art. VI. Under the denomination contraband of war, the following articles are included:

167 "Cannons, machine-guns, mortars, guns, all kinds of arms and fire-arms, bullets, bombs, grenades, fuses, cartridges, matches, powder, *sulphur*, saltpetre, dynamite, and every kind of explosive, articles of equipment like uniforms, straps, saddles and artillery and cavalry harness, engines for ships and their accessories, shafts, screws, boilers and other articles used in the construction, repair and arming of warships, and in general all warlike instruments, utensils, tools, and other articles, and whatever may hereafter be determined to be contraband."

168 A formal declaration of war by the United States was also published on April 25th, 1898, but acts of war had been committed heretofore, and the declaration itself announced that a state of war had existed from and including April 21st, 1898.

On hearing of the existence of war, and that sulphur had been declared contraband by the Spanish Government, the Master being informed that Spanish ships of war were cruising along the Spanish coast and in the Straits of Gibraltar, directly in the course of his intended voyage toward the port of New York, con-

cluded it would be unsafe to carry the cargo to desti- 169
nation, and, therefore, determined to re-land and store it at the port of Girgenti, in accordance with the above quoted provision of the bills of lading.

The work of unloading and storing the cargo was begun on April 27th, and was completed at noon on the 7th of May, 1898.

All of the said sulphur was stored in the warehouse of Xenobio Urso, a qualified storekeeper at that port, and placed in charge of a mercantile agent named William Peirce. Letters were put in the post office 170
addressed to the shippers and consignees, stating that the goods had been landed on account of the war, and informing them of the place and circumstances of the deposit, and thereupon, as the claimant is informed and believes, the goods, became and were at the shippers' risk and expense, and that the Master and owners were discharged from all responsibility therefor, by virtue of the above quoted clause in the bills of lading.

(3.) The course of the vessel on her voyage towards 171
New York lay along the coast and by the lighthouses of Spain, and the presence of her naval vessels in her coast water and in the Straits of Gibraltar, created a liability to capture, which amounted, or which the Master was justified in believing amounted to a restraint of princes and rulers or people, within the sense of that exception in the bills of lading.

(4.) The bills of lading further provided as follows:

"The shipowner is not to be liable for any damage 172
to any goods which are capable of being covered by insurance."

The claimant is informed and believes that any loss or damage which the libellant may have suffered in the premises, was capable of being covered by insurance, and that, accordingly, under the aforesaid clause, the owners of the goods must be deemed to have assumed the risk of such loss or damage, and to have released the shipowner from all claim therefor, having recourse to insurance for their protection.

173 (5.) The bills of lading further provided:

"The shipowner is not to be liable * * * in any case for more than the invoice or declared value of the goods, whichever shall be least."

The claimant avers that during the months of August and September, 1898, he brought forward the said sulphur in another vessel belonging to the same owners, under the terms of a stipulation with the libellant, a copy of which is hereto annexed marked Exhibit "B"
174 and made a part thereof, and delivered the same to the libellant at the port of New York, who duly accepted the same.

He is informed and believes that libellant has realized by the sale of said sulphur, more than its invoice price, and that, accordingly, under the above quoted provision of the bills of lading, and the libellant has not suffered any damages in the premises which are recovable in this action.

(6.) Upon information and belief the claimant alleges
175 that by the Italian law which prevailed at the port of shipment, either party to a contract of carriage can withdraw from it without being liable for damages when, before the vessel has left the jurisdiction, war has been declared in consequence of which the vessel or the goods to be shipped according to the contract of affreightment can no longer be considered free, and would be liable to risk or capture.

In consequence of the declaration of war, and of the royal proclamation hereinbefore referred to, the cargo
176 of the *Styria* would no longer be considered free, and was liable to risk of capture. The claimant, accordingly, was justified, under Italian law, in withdrawing from the contract, and re-landing and storing the cargo at the risk of and for the account of the shippers, and said vessel is not liable in damages for the acts of the Master in so doing.

SEVENTH.—All and singular, the premises of this answer are true.

Wherefore, the claimant prays that the said libel

may be dismissed with costs, or that such other de- 177
cree may be made as the justice of the cause may require.

CONVERS & KIRLIN,
Proctors for Claimant.

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss.:

E. B. CONVERS, being duly sworn, says that he is one of the proctors for the claimant herein, and that the foregoing answer is true to the best of his knowl- 178
edge, information and belief, derived from communications received from the owners of the vessel and their agents, and from the testimony of the master herein.

Deponent further says that the reason why this answer is not verified by the claimant is that he is absent from the United States.

E. B. CONVERS.

Sworn to before me this }
1st day of December, 1898. }

JAMES T. KILBRETH, 179
[SEAL] Notary Public,
New York County.

[Endorsed:]—Answer filed December 1, 1898.

Exhibits A and B annexed to foregoing answer being the same as exhibits A and B annexed to answer in suit of Morgan *v. Styria*, are omitted here by consent.

180

181 To Honorable Addison Brown, Judge of the District Court of the United States for the Southern District of New York:

The libellants, John Munroe, Henry W. Munroe, Edgar Lockwood and Frederick Reiset, bankers, lawfully doing business in the City of New York, according to the statute in such case made and provided, under the firm name of John Munroe & Company, against steamship *Styria*, whereof A. G. Scopinich
182 was and is master, her tackle, apparel, furniture, engines, pumps, &c., and all persons intervening for their interests therein in a cause or contract civil or maratime, allege as follows:

First.—That on or about the 24th day of April, 1898, F. Amato & Company, of Palermo, in the Kingdom of Italy, shipped on board of said steamship, then lying in the port of Girgenti, in the Kingdom of Italy, and bound for the port of New York, in good order, well conditioned to be carried and transported in said
183 steamship to the port of New York and delivered to the order of John Munroe & Company, one hundred tons of brimstone seconds, best quality, unmixed, in bulk, in like good order, for the freight of six shillings and three pence per ton of two thousand two hundred and forty pounds (2,240 lbs.), as delivered, and average accustomed to be paid by the libellants to the said F. Amato & Company, receiving thereon from the said master three bills of lading, receipts and contracts, all of even tenor and date, one of which being accom-
184 plished, the other two stand void, whereby and wherein he charged his body and goods, and also the said vessel, her tackle, apparel and furniture, for the performauce of said contract, a copy of which is hereto annexed.

Second.—That the said steamship sailed for the said port of New York, where she arrived on the 3d day of June, 1898, and now is; but notwithstanding that the libellants have been at all times ready and willing, and

still are ready and willing, to receive the said mer- 185
chandise in good order, and on so receiving the same to pay the freight thereon, yet the said master has not delivered the said merchandise to the libellants.

THIRD.—That the libellants have demanded of the master of said vessel the delivery of the said goods, tendering him the said bill of lading, duly endorsed, and also all the lawful charges thereon for the freight and otherwise, but the said master has neglected and refused to deliver the said goods, *and has converted* 186
the same to his own use, whereby the said libellants have sustained damage to the amount of the value of the said goods, to wit, the sum of three thousand four hundred dollars ($3,400), with interest thereon from the 24th day of April, 1898.

FOURTH.—That the said steamship is a foreign vessel, and is now soon to leave this port in the United States, and the said master has refused and refuses to pay the said damage, or to deliver such mer- 187
chandise, so that the libellants will be without remedy unless, by proceedings against such vessel, her tackle, apparel, furniture, engines, boilers, &c.

FIFTH. That all and singularly the premises are true and are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellants pray that process in due form of law, according to the course of this Court in case of admiralty and maritime jurisdiction, may be issued 188
against the said master and against the said steamship, her tackle, apparel, furniture, engines, boilers, &c., and that all persons claiming an interest therein may be cited to appear and answer all and singularly the matters aforesaid, and that this Honorable Court will be pleased to decree the payment of the damages afore said, with costs, and that the said vessel may be condemned and sold to pay the same, and that the said libellants may have such other and further relief in the

189 premises as in law and justice they may be entitled to receive.

STERN & RUSHMORE,
Proctors for Libellants,
Office and P. O. address,
No. 40 Wall Street,
New York City.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.
City of New York.

190 EDGAR LOCKWOOD, being duly sworn, says: That he is a member of the firm of John Munroe & Company, the libellants named in the foregoing libel; that he has read the same and knows the contents thereof, and that the same is true according to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters, he believes it to be true.

191 EDGAR LOCKWOOD.

Sworn to before me this
7th day of June, 1898.
S. INGERSOLL KETTOR,
Notary Public,
Kings County.
Certificate filed in N. Y. Co.

Shipped in apparent good order and conditioned by F. AMATO & Co., in and upon the steamship called the
192 *Styria*, whereof A. G. Scopinich is master for this present voyage, and now lying in the port of Girgenti and bound for New York, with liberty to call at any port or ports in any rotation in the Mediterranean, Adriatic and adjacent seas, or on the coast of Spain or Portugal, or in the Azores, or in North America, for the purpose of receiving and delivering coals, cargo or passengers, or for any other purpose whatsoever, to sail with or without pilots, to tow and assist vessels in all situations, although deviating thereby from the voyage, and to carry goods of all kinds, dangerous or

otherwise, and with liberty to tranship any part of the 193
cargo by steamer (100) one hundred tons of pounds
2240 brimstone seconds best quality unmixed in bulk.

Said to be marked and numbered as per margin and
to be delivered from the ship's deck where the ship's
responsibility shall cease in the like good order and
condition at the aforesaid port of New York, or so
near thereunto as she may safely get, the Act of God,
the Queen's Enemies, Pirates, Robbers by land or sea,
jettison, thieves, vermin, barratry of master or mar-
iners, restraints of princes and rulers of people, loss or 194
damage resulting from any of the following perils:
whether arising from the negligence, default orerr or in
judgment of the pilot, master, mariners, engineers, steve-
dore or other persons in the service of the ship or any
other ship or ships, belonging to or sailing under the flag
of the company or otherwise, namely: risk of lighterage
to or from the vessel or of craft or hulk or trans-ship-
ment, explosion, heat or fire at sea in craft or hulk
or on shore, bursting of boilers, unseaworthiness
arising from the breakage of shafts, latent defect 195
in hull, machinery or appurtenances, or from the con-
sequences of any damage or injury thereto, howsoever
such damage or injury may be caused, collisions,
strandings, straining, or other perils of the seas, rivers.
navigation or land transit of whatever nature or kind
soever and howsoever caused except with liberty (in
event of steamer putting back to this or to any other
port or otherwise being prevented from any cause from
commencing or proceeding in the ordinary course of
her voyage) to ship or transship the goods by any 196
other steamer, and with liberty to proceed under sail
or in tow or any other manner which the ship's owner
may think fit, unto Messrs. John Munroe & Co. or to his
or their assigns, he or they paying freight, the shipper
also remaining liable for the same for the entire quan-
tity of goods therein enumerated, whether delivered
sound or unsound, in cash, free of interest, on the
ship's delivery at and after the rate of six shillings and
threepence British sterling per ton in full, with
per cent. primage and average accustomed, or the

equivalent thereof, payable in cash, without discount, at the rate of exchange current on the day of the ship's arrival for banker's sight bills on London.

Any average that may arise on the voyage to be adjusted according to York and Antwerp rules— *Weight*, measurement, gauge, contents, quantity, quality, condition, brand and value unknown and not accountable for loss or damage resulting from stowage, sweating, leakage, breakage, pilferage, *wastage*, rust, decay, rain, spray, frost, thaw, effect of climate or heat of hold, bursting of bags, damage of rats, deterioration of quality, defects, slightness or insufficiency of packages, contact with, or smell, or evaporation from any other goods, nor for incorrect delivery of goods arising from inaccuracies, obliteration, insufficiency of marks or numbers or from any such being incorrectly stated in this bill of lading, or injury to wrappers, however caused.

If the said goods be of a perishable nature, such as green fruit, the consignee, his agents or assigns, shall claim the same and pay the freight thereon within forty-eight hours after the same is ready for delivery, and in default thereof the charterers or their assigns may, at their option, sell such goods at public auction for account and risk of whom it may concern, and apply the proceeds of such sale as follows: to pay the expenses of such sale and all freight, custom dues and other charges properly chargeable to said goods, and to hold the overplus, if any, for account of whom it may concern, and if the said proceeds shall not be sufficient to pay said freight, expenses, duty and other charges, such sales shall not prejudice the right of the charterers to enforce the collection of the remainder.

Goods will be held free of charge for primage for five days from entry of steamer at Custom House.

A charge for primage of one-third of one per cent. per box per day will be collected for each box for every day held thereafter until and including the day of delivery, not accountable for loss or damage caused by

heating machinery, if any, or connection thereof on 201
dock, where goods will be discharged.

All fines, expenses, losses or damages which the shipowner or his agents or servants or the ship or cargo may incur or suffer on account of incorrect or insufficient marking of the packages or description of their contents, or the dangerous nature of such contents, shall be paid by the shipper or consignee as may be required, and the shipowner shall have a lien on the goods for the pay ment thereof.

Simultaneously with the ship being ready to unload 202
the above mentioned goods, or any part thereof, the consignee of the said goods is hereby bound to be ready to receive the same from the ship's side, either on the wharf or quay at which the ship may lie for discharge, or into lighters provided with a sufficient number of men to receive and stow the goods therein, and in default thereof the master or agent of the ship and the Collector of the above Port are hereby authorized to enter the said goods at the Custom House, and land, warehouse or place them in lighters, without 203
notice to, and at the risk and expense of, the said consignee of the goods after they leave the deck of the ship.

The Collector of the Port of discharge being hereby authorized to grant a general order for the discharge immediately after entry of the ship.

The captain or owner has a lien on the goods for unpaid freight, through freight, average claims or liabilities incurred in respect of any charges stipulated herein, to be borne by the owners of the goods. 204
Freight on perishable goods to be paid by the shipper or consignee in whatever condition they may be delivered. Freight if payable by shippers is due in full in exchange for bill of lading and to be considered as earned, ship lost or not lost, and if payable by con signee on arrival of goods on place destination, in ex change for delivery order. Settlement in either case to be made without discount or abatement. Freight on goods to order, liquids and brittle or perishable goods payable by shippers if required.

205 The shipowner is not to be liable for any damage to any goods which are capable of being covered by insurance nor for any claim notice of which is not given before the removal of the goods, nor for claim for damage or detention of goods under through bill of lading, where the damage is done or detention occurs whilst the goods are not in the possession of the shipowner, nor in any case for more than the invoice or declared value of the goods which ever shall be the least. Not accountable to any extent for gold
206 or silver manufactured, or unmanufactured, or in the shape of coin, plated articles, glass, china, jewelry, precious stones, trinkets nor for any other highly valued goods unless the value be herein expressed and extra freight as may be agreed upon may be paid. The only condition on which glass will be carried is that the shipowner will not be held liable for any breakage which may occur, however caused.

Shippers will be held accountable for all damage
207 caused by goods of an inflammable, explosive or otherwise dangerous character, shipped without permission or without full disclosure of their nature, whether such shippers shall be aware thereof or not, and whether such shippers shall be principal or agents only, and such goods may be seized and confiscated or destroyed by the shipowner at any time before delivery, without any compensation to the shipper or consignee.

This bill of lading duly endorsed to be given in exchange for delivery order.

208 In case of blockade or interdict of the port of discharge, or if, without such blockade or interdict, the master shall consider it unsafe, for any reason, to enter or discharge cargo there he is to have option at landing the goods at any other port which he may consider safe, at shipper's risk and expense, and on the goods being placed in charge of any mercantile agent, or of British Consul, and a letter being put into the post office addressed to the shipper or consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and

the master and owners discharged from all responsi- 209
bility.

In the event of quarantine the goods to be discharged on arrival into quarantine depot, hulk, lighter or other vessel neccessary for the ship's despatch, at the consignee's risk and expense, or should this be impracticable, or the vessel not admitted, or should commmunication subject the steamer to quarantine at a subsequent port of call, the master to have the option and is hereby authorized to land the cargo at the nearest safe port to which the vessel is bound, at the risk and expense 210
of the consignees, and on the goods being placed in charge of any mercantile agent, or of the British Consulate, a letter being put into the post-office addressed to the shipper or consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the master and owners discharged from all responsibility.

Notice, in accepting this bill of lading the shipper or other agent of the property carried expressly accept and agrees to all its stipulations exceptions and condi- 211
tions, whether written or printed

In witness whereof the master or agent of the said ship hath affirmed to three bills of lading, all of this tenor and date, and one of which bill being accomplished, the others to stand void.

Not accountable for wrong marks or numbers.

Dated in Girgenti, this 24th day April, 1898.

Weight and quality unknown.

ANTONIO G. SCOPINICH,
Master. 212

With liberty either before or after proceeding towards the port of discharge, to proceed to and stay at any ports or places whatsoever (although in a contrary direction to or out of or beyond the route to the said port of discharge) once or oftener, in any order backwards or forwards, for loading or discharging cargo, or passengers, or for any other purpose whatsoever, and all such ports and places and sailings shall be deemed included within the intended voyage. This liberty is

not to be considered as restricted by any words in this contract whether written or printed.

Said to be marked as per margin it is specially stipulated that no claim is to be made by the shipper or receiver for any loss arising from difference in marks or contents.

If during the winter season the within mentioned goods are discharged at a dock fitted with heating machinery, a charge of one-third of one cent (United States Currency) per box per day will be levied on all boxes (accidents to machinery, etc., always excepted).

I. & V. Florio, Palermo.

(A flag)

Transoceanic Line.

In bulk 100 tons brimstone 2ds Bost.

N 1 hold and N 5 between deck.

A. G. S.

[Endorsed:]—per pro John Munroe & Co., Edward T. Latham.

[Endorsed:]—Libel filed June 7, 1898.

To the Honorable ADDISON BROWN, United States District Judge, for the Southern District of New York: 217

The answer of Antonio G. Scopinich, claimant of the Steamship *Styria*, to the libel of John Munroe, Henry W. Munroe, Edgar Lockwood and Frederick Reiset, against the said steamship, in a cause of contract, civil and maritime, alleges as follows:

FIRST.—He admits that on or before the 24th of April, 1898, F. Amato & Co, shipped on board said 218
steamship then lying in the port of Girgenti, in the Kingdom of Italy, and bound to the port of New York, a consignment of sulphur said to weigh 100 tons, and to be seconds best quality, unmixed, in bulk, to be delivered at the port of New York, or as near thereto as the steamer could safely get with the said cargo, to the order of John Munroe & Co., on payment of the freight, and upon the other conditions stated in the bills of lading, a copy of which is annexed to the libel.

219

SECOND.—He admits that the steamship afterwards sailed and proceeded to the port of New York, arriving on or about the 3rd day of June, 1898, but did not then and there deliver the said sulphur unto the libellants.

He denies any knowledge or information sufficient to form a belief, with regard to the other matter alleged in the second article of the libel. He further says that by reason of the outbreak of war between Spain and the United States, and the declaration of the Government of Spain that sulphur was contraband of war, it 220
became, in his judgment, unsafe to transport the said cargo past the coast of Spain and through the Straits of Gibraltar to New York, and that, accordingly, he re landed and stored the cargo at the port of shipment, on due notice to the shippers, and that he was justified, under the circumstances, in so doing.

THIRD.—Upon information and belief, he denies the matters alleged in the third article of the libel.

FOURTH.—He admits the matters alleged in the

221 fourth article of the libel, except as hereinbefore and hereinafter alleged.

FIFTH.—He admits the jurisdiction of the Court, but denies the other matters in the fifth article of the libel alleged.

SIXTH.—Further answering the said libel, and for a further and separate defense thereto, claimant alleges as follows:

222 (1.) That the bills of lading under which the said brimstone, otherwise called "sulphur," was carried, provided that it was to be delivered "at the aforesaid port of New York, or so near thereunto as she may safely get, the Act of God * * * restraints of Princes and Rulers or People * * * excepted * * * In case of blockade or interdict of the port of discharge, or if without such blockade or interdict, the master shall consider it unsafe, for any reason, to enter or discharge cargo there, he is to have option of
223 "landing the goods at any other port which he may consider safe, at shipper's risk and expense, and on the goods being placed in charge of any mercantile agent or of British Consul, and a letter being put into the postoffice addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the master and owners discharged from all responsibility."

(2.) The loading of the said sulphur on board the
224 *Styria* was completed and bills of lading therefor had been signed, on or before the 20th day of April, 1898, the master being ignorant up to that time that a state of war existed between the United States and Spain, but, in fact, on the 23rd of April, 1898, the Queen Regent of Spain had promulgated a royal decree, a copy of which is hereto annexed marked Exhibit "A" and made a part hereof, announcing that a state of war existed between Spain and the United States; that Spain intended to observe the principle that a neutral flag covers the enemy's goods, except contraband of

war; that the Spanish government proposed to organize a service of auxiliary cruisers of the navy for the purpose of cruising in co-operation with regular ships of war, and further providing that in order to confiscate the enemy's merchandise under their own flag and contraband of war under any flag the royal navy, auxiliary cruisers and privateers, if and when authorized, would exercise the right of visit on the high seas and in the territorial waters of the enemy, and defined contraband as follows: 225

"Art. VI. Under the denomination contraband of war the following articles are included: 226

"Cannons, machine guns, mortars, guns, all kinds of arms and firearms, bullets, bombs, grenades, fuses, cartridges, matches, powder, *sulphur*, saltpetre, dynamite, and every kind of explosive, articles of equipment like uniforms, straps, saddles and artillery and cavalry harness, engines for ships and their accessories, shafts, screws, boilers and other articles used in the construction, repair and arming of war ships, and in general all warlike instruments, utensils, tools and other articles and whatever may hereafter be determined to be contraband." 227

A formal declaration of war by the United States was also published on April 25th, 1898, but acts of war had been committed theretofore, and the declaration itself announced that a state of war had existed from and including April 21st, 1898.

On learning of the existence of war and that sulphur had been declared contraband by the Spanish government, the master being informed that Spanish ships of war were cruising along the Spanish coast and in the Straits of Gibraltar, directly in the course of his intended voyage towards the port of New York, concluded it would be unsafe to carry the cargo to destination, and, therefore, determined to re-land and store it at the port of Girgenti, in accordance with the above quoted provision of the bills of lading. 228

The work of unloading and storing the cargo was begun on April 27th and was completed at noon on the 7th of May, 1898.

All of the said sulphur was stored in the warehouse

of Xenobio Urso, a qualified storekeeper at that port, and placed in charge of a mercantile agent named William Peirce. Letters were put into the postoffice addressed to the shippers and consignees, stating that the goods had been landed on account of the war, and informing them of the place and circumstances of the deposit, and thereupon, as the claimant is informed and believes, the goods became and were at the shippers' risk and expense, and that the master and owners were discharged from all responsibility therefor by virtue of the above quoted clause in the bills of lading.

(3.) The course of the vessel on her voyage towards New York lay along the coast and by the lighthouses of Spain, and the presence of her naval vessels in her coast waters and in the Straits of Gibraltar created a liability to capture, which amounted, or which the master was justified in believing, amounted to a restraint of princes and rulers or people, within the sense of that exception in the bills of lading.

(4.) The bills of lading further provided as follows:

"The shipowner is not to be liable for any damage to any goods which are capable of being covered by insurance."

The claimant is informed and believes that any loss or damage which the libellants may have suffered in the premises was capable of being covered by insurance, and that, accordingly, under the aforesaid clause, the owners of the goods must be deemed to have assumed the risk of such loss or damage, and to have released the shipowner from all claim therefor, having recourse to insurance for their protection.

(5.) The bills of lading further provided:

"The shipowner is not to be liable * * * in any case for more than the invoice or declared value of the goods, whichever shall be least."

The claimant avers that during the months of August and September, 1898, he brought forward the said sulphur in another vessel belonging to the same owners,

under the terms of a stipulation with the libellants, a 233
copy of which is hereto annexed, marked Exhibit "B" and made a part hereof, and delivered the same to the libellants at the port of New York, who duly accepted the same.

He is informed and believes that libellants have realized by the sale of the said sulphur more than its invoice price, and that, accordingly, under the above quoted provision of the bills of lading, the libellants have not suffered any damages in the premises which are recoverable in this action. 234

(6.) Upon information and belief, the plaintiff alleges that, by the Italian law, which prevailed at the port of shipment, either party to a contract of carriage can withdraw from it without being liable for damages when, before the vessel has left the jurisdiction, war has been declared, in consequence of which the vessel or the goods to be shipped according to the contract of affreightment can no longer be considered free, and would be liable to risk of capture. 235

In consequence of the declaration of war, and of the royal proclamation hereinbefore referred to, the cargo of the *Styria* could no longer be considered free, and was liable to risk of capture. The claimant, accordingly, was justified, under Italian law, in withdrawing from the contract and relanding and storing the cargo at the risk of and for the account of the shippers, and said vessel is not liable in damages for the acts of the master in so doing.

SEVENTH.—All and singular the premises of this 236
answer is true.

Wherefore, the claimant prays that the said libel may be dismissed with costs, or that such other decree may be made as the justice of the cause may require.

CONVERS & KIRLIN,
Proctors for Claimant.

237 SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss.:

E. B. CONVERS, being duly sworn, says that he is one of the proctors for the claimant herein, and that the foregoing answer is true to the best of his knowledge, information and belief, derived from communications received from the owners of the vessel and their agents, and from the testimony of the master herein.

Deponent further says that the reason why this an-
238 swer is not verified by the claimant is that he is absent from the United States.

E. B. CONVERS.

Sworn to before me this 1st }
day of December, 1898. }
JAMES T. KILBRETH,
[SEAL.] Notary Public,
New York County.

[Endorsed :]—Answer filed Dec'r 1st, 1898.

239 Exhibits A and B annexed to foregoing answer being the same as Exhibits A and B annexed to answer in suit of Morgan *v. Styria*, are omitted here by consent.

240

241

To the Honorable Addison Brown, United States District Judge for the Southern District of New York:

The libel of Austro-Americana Steamship Company, owner of the steamships *Styria* and *Abbazia*, against 3,250 cantars of brimstone, owned by James L. Morgan & Co., ex-steamship *Abbazia*, in a cause of contract, civil and maritime, alleges as follows:

First.—The libellant, Austro-Americana Steamship 242
Company, is a corporation organized and existing under the laws of the Austro-Hungarian Empire, with its principal office at Trieste, and owner of the Austro-Hungarian steamships *Styria* and *Abbazia*.

Second.—That, on or about the 23rd day of April, 1898, there was shipped by John Sofio & Co., on board the steamship *Styria*, at the port of Gergenti, in the Kingdom of Italy, a quantity of crude brimstone in bulk, said by the shippers to consist of 3,250 cantars, 243
or about 250 tons, to be delivered at the port of New York to Brown Brothers & Co., subject to certain terms, conditions and exceptions set forth in the bill of lading issued therefor by said vessel.

On or about the 27th day of April, 1898, after said brimstone had been loaded, war having been declared between the United States and Spain, whereby said brimstone became and was contraband of war, the master of the *Styria* in accordance with the terms of the bill of lading issued 244
for the brimstone, and within his rights under the law, caused said brimstone to be discharged from the *Styria* and placed in store with a mercantile agent at the port of Empodocle, the seaport of Girgenti, and at the shipper's risk and expense, and deposited in the Post Office a letter addressed to the shippers, and to the consignees of the merchandise, stating that the goods had been landed, and with whom deposited, and were at the shippers' risk and expense.

That the bill of lading issued for the brimstone contained the following exception:

"Restraint of princes and rulers or people * * * excepted."

That the outbreak of war between Spain and the United States rendered the transportation of said brimstone to New York unlawful as contraband of war, and that if said voyage had been attempted, the cargo of brimstone and the *Styria* would have been liable to seizure by Spanish war vessels, and said risk of seizure, therefore, amounted to a "restraint of princes, rulers or people," and, therefore, released the vessel from any obligation to transport said brimstone.

THIRD—Thereafter, the *Styria* loaded a cargo of fruit and proceeded to the port of New York, where, on her arrival on or about June 28th, 1898, she was arrested in the libel suit now pending in this Court, of James L. Morgan *et al.*, as owners of said brimstone, against said vessel for the non-delivery thereof, in which damages were claimed in the sum of $5,000. Stipulations for value and costs were duly filed by Antonio G. Scopinich, as master and claimant, acting in behalf of this libellant, and said vessel was thereupon released from the custody of the marshal.

Thereafter a stipulation was entered into on the 12th day of August, 1898, between the Proctors for the said James L. Morgan *et al.* and the Proctors for the steamship *Styria* and this libellant, providing that the claimant of the *Styria*, acting for this libellant, should forward the brimstone before mentioned, landed at the port of Empedocle, on the first available steamer from that port to New York, and on delivery of same to the consignees upon the terms specified in the original bill of lading, freight to be paid by the consignees, and the goods upon arrival to be sold and proceeds credited on account of damages, if any, in that suit. It was also provided that the claimant should have a lien on said brimstone for the charges in Sicily against the respective portions, provided claimant was justified in re-landing and storing the cargo as and when he

did, all of which was without prejudice, it being the 249
purpose of the stipulation that the claimant and this libellant should have a lien on the brimstone for the charges and expenses which the libellants Morgan *et al.* would have had to pay if they had undertaken to forward the cargo for their own account. A copy of said stipulation is hereto annexed, marked Exhibit "A," and made a part of this libel.

Fourth.—That libellant despatched the steamship *Abbazia* to Port Empedocle, Girgenti, where she ar- 250
rived on or about the 24th day of August, 1898, and pursuant to the terms of said stipulation, thereafter paid the charges in Sicily against said brimstone, and loaded it, and on or about September 4th, proceeded therewith to the port of New York.

The *Abbazia* was wrongfully detained for a period of three days over and above the time she would have ordinarily and otherwise have consumed in loading said cargo of brimstone, by reason of the failure of the shippers of said brimstone, which is the subject of this 251
libel, and of James L. Morgan & Co. and their agents, to furnish said brimstone for shipment at Port Empedocle, or to give the proper instructions and facilities for its loading, or make the necessary arrangements in accordance with the stipulation hereto annexed. That the reasonable value of the use per day of the steamship *Abbazia* is $125, and the detention chargeable against said brimstone, therefore, amounts to $375.

That the libellant laid out and expended certain sums for unloading and landing of said sulphur from the 252
Styria, also for the storage, lighterage, watching, legal expenses and loading of said cargo, as well as other incidental charges, all of which were necessary and reasonable, and expended for the benefit of said cargo, and on its credit, and for its preservation, and in accordance with the terms of the bill of lading issued therefor, both by the *Styria* and the *Abbazia*, by the terms of the stipulation hereto annexed, and by the maritime law, were and are a charge and lien against said brimstone enforceable by this Court.

253 Said charges and expenses amount to about the sum of $925.

The steamship *Abbazia* has now arrived at the port of New York, and has discharged or will be discharging said brimstone during the currency of this process, into lighters at the foot of Forty-second street, Brooklyn, and payment of the charges and expenses herein set forth has been demanded of the consignees and refused.

Fifth.—That said brimstone is now within the juris-
254 diction of this Honorable Court, and subject on behalf of libellant to a lien by the general maritime law, and by virtue of said stipulation and bills of lading for all the charges and expenses herein set forth.

Sixth.—All and singular the premises of this libel are true, and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore libellant prays that process in due form of law may issue against said brimstone, and that the
255 same may be condemned and sold to pay the said claim, and that all persons intervening for their interest therein may be cited to appear and answer all and singular the matters aforesaid, and for such other and further relief as it may be entitled to receive.

Convers & Kirlin,
Proctors for Libellant.

Southern District of New York, }
City and County of New York, } ss.:

256

E. B. Convers, being duly sworn, deposes and says that he is one of the proctors for the libellant herein; that the foregoing libel is true to the best of his knowledge, information and belief, derived from statements made by the masters of the steamships *Abbazia* and *Styria*, and that the reason this verification is not made by the libellant is that it is a foreign corporation, with its principal office at Trieste, Austria, and none of its officers resides or is now within the district, or within one hundred miles of the place of trial.

E. B. Convers.

257

Sworn to before me this 30th day of September, 1898.

JAMES T. KILBRETH,
[SEAL.] Notary Public,
New York County.

[Endorsed :]—Libel filed October, 1, 1998.

UNITED STATES DISTRICT COURT, 258

SOUTHERN DISTRICT OF NEW YORK.

MALCOMSON *et al.*

AGAINST

The Steamship "STYRIA," etc.

MORGAN *et al.* 259

AGAINST

The Same.

PARSONS *et al.*

AGAINST

The Same. 260

MUNROE *et al.*

AGAINST

The Same.

It is stipulated and agreed between the parties as follows :

1. The claimant shall forward the cargo landed *ex*

261 *Styria*, at Port Empedocle, on the first available steamer from that port to New York, and shall deliver the same to the consignees, upon the terms, and for the freight specified in the original bills of lading, the consignees to receive the same and to pay the agreed freight on right and true delivery; the goods upon arrival to be sold at current market rates, and the proceeds, less charges incurred, to be credited on account of the damages, if any, recovered in these cases by the libellants.

262 2. The claimant shall have a lien on the portions of the cargo to be delivered to the several libellants for the respective amounts of the charges against the respective portions of the brimstone in Sicily, provided the claimant was justified in re-landing and storing the cargo at Port Espedocle as and when he did. If it be held that the re-landing and storage of the cargo was not justified, then the said brimstone shall be free from any lien on account of the aforesaid charges or ex-
263 penses, except freight, which is provided for in paragraph first of this stipulation.

It is the purpose and intent of this paragraph of the stipulation to provide that if the claimant was justified in re-landing and storing the cargo as and when he did, he shall have a lien upon the respective consignments for their respective proportions of the charges and expenses against the same, which the libellants would have had to pay (exclusive of the charges provided for in the first paragraph of this stipulation), if
264 they undertook to forward the cargo for their own account.

3. This stipulation and anything done by any party under it, shall be deemed to be wholly without prejudice in the pending suits, except as herein provided.

New York, August 12th, 1898.

SULLIVAN & CROMWELL,
Proctors for Malcomson *et al.*

COWEN, WING, PUTNAM & BURLINGHAM,
Proctors for Morgan *et al.*

BOWERS & SANDS,
Proctors for Parsons *et al.*
STERN & RUSHMORE,
Proctors for Monroe *et al.*
CONVERS & KIRLIN,
Proctors for SS. *Styria.* 265

The foregoing stipulation marked "Exhibit A," which is also annexed to the three other libels of the Austro-Americana SS. Co. against consignments of brimstone and is therefore not refunded in connection therewith by consent. 266

To the Honorable ADDISON BROWN, Judge of the District Court of the United States for the Southern District of New York:

James L. Morgan, John M. Goetchius, James L. Morgan, Jr.; Henry K. Goetchius and Lancaster Morgan, owners and claimants of 3,250 cantars of brimstone, as the same are proceeded against upon the libel of Austro-Americana Steamship Company, in an alleged cause of contract, civil and maritime, answers said libel as follows: 267

FIRST.—The claimants admit the first article of said libel.

SECOND.—The claimants admit the allegations of the first paragraph of the second article of said libel.

They admit that the master of the *Styria* caused the brimstone to be discharged and placed in store at the port of Empodocle, the sea port of Girgenti; that the bill of lading issued for the brimstone contained the exception the "restraint of princes, rulers or people excepted." 268

Further answering, the claimants deny each and every other allegation of the second article of said libel.

THIRD.—The claimants admit the third article of said libel.

269 FOURTH.—The claimants admit the allegations of the first paragraph of the fourth article of said libel. They also admit that the arrival of the steamship *Abbazia* in New York and the discharge of certain brimstone in Brooklyn, and the refusal of certain alleged charges and expenses.

Further answering, they deny each and every allegation of the fourth article of said libel.

FIFTH.—The claimants admit that said brimstone was
270 within the jurisdiction of this Court at the time of the filing of the libel herein, and they deny the other allegation of the fifth article of said libel.

SIXTH.—The claimants admit the jurisdiction of the Court and deny the other allegation of the sixth article of said libel.

All and singular the premises are true.

Wherefore, the claimants pray that the libel herein
271 may be dismissed with costs.

JAMES L. MORGAN, JR.

Sworn to before me this 14th day of February, 1899.

JAMES T. KILBRETH,
Notary Public,
New York County.

COWEN, WING, PUTNAM & BURLINGHAM,
Proctors for Claimants.

272 Endorsed:—Answer filed February 15, 1898.

To the Honorable ADDISON BROWN, United States District Judge for the Southern District of New York: 273

The libel of Austro-Americana Steamship Compnp, owner of the steamships *Styria* and *Abbazia*, against 4550 cantars of brimstone, owned by Schuyler L. Parsons, *ex* steamship *Abbazia*, in a cause of contract, civil and maritime, alleges as follows:

FIRST.—The libellant Austro-Americana Steamship 274
Company is a corporation organized and existing under the laws of the Austro-Hungarian Empire, with its principal office at Trieste, and owner of the Austro Hungarian steamships *Styria* and *Abbazia*.

SECOND.—That on or about the 21st day of April, 1898, there was shipped by Ferdinand Baller & Co., on board the steamship *Styria*, at the port of Girgenti, in the Kingdom of Italy, a quantity of crude brimstone in bulk, in two lots, said by the shippers to consist of 275
1300 cantars, or about 100 tons, and 3250 cantars, or about 250 tons each, to be delivered at the port of New York, to C. J. Hambro & Son, and to order respectively, subject to certain terms, conditions and exceptions set forth in the bills of lading issued therefor by said vessel.

On or about the 27th day of April, 1898, after said brimstone had been loaded, war having been declared between the United States and Spain, whereby said brimstone became and was contrabrand of war, the 276
master of the *Styria*, in accordance with the terms of the bill of lading issued for the brimstone, and within his rights under the law, caused said brimstone to be discharged from the *Styria* and placed in store with a mercantile agent at the port of Empedocle, the seaport of Girgenti, and at the shipper's risk and expense, and deposited in the postoffice a letter addressed to the shippers, and to the consignees of the merchandise, stating that the goods had been landed, and with whom deposited, and were at the shippers' risk and expense.

277 That the bills of lading issued for the brimstone contained the following exceptions:

"Restraint of princes and rulers of people * * * excepted."

That the outbreak of war between Spain and the United States rendered the transportation of said brimstone to New York unlawful as contrabrand of war, and that if said voyage had been attempted the cargo of brimstone and the *Styria* would have been liable to
278 seizure by Spanish war vessels, and said risk of seizure, therefore, amounted to a "restraint of princes, rulers or people," and, therefore, released the vessel from any obligation to transport said brimstone.

THIRD.—Thereafter the *Styria* loaded a cargo of fruit, and proceeded to the port of New York, where, on her arrival on or about June 20th, 1898, she was arrested in the libel suit, now pending in this Court, of Schuyler L. Parsons, as owner of said brimstone, against said vessel for the non-delivery thereof, in
279 which damages were claimed in the sum of $11,200. Stipulations for value and costs were duly filed by Antonio G. Scopinich, as master and claimant, acting in behalf of this libellant, and said vessel was thereupon released from the custody of the marshal.

Thereafter, a stipulation was entered into on the 12th day of August, 1898, between the proctors for the said Parsons and the proctors for the steamship *Styria* and this libellant, providing that the claimant of the *Styria*, acting for this libellant, should forward
280 the brimstone before mentioned, landed at the port of Empedocle, on the first available steamer from that port to New York, and on delivery of same to the consignees, upon the terms specified in the original bills of lading, freight to be paid by the consignees, and the goods upon arrival to be sold and proceeds credited on account of damages, if any, in that suit. It was also provided that the claimant should have a lien on said brimstone for the charges in Sicily against the respective portions, provided

claimant was justified in re-landing and storing the cargo as and when he did; all of which was without prejudice, it being the purpose of the stipulation that the claimant and this libellant should have a lien on the brimstone for the charges and expenses which the libellant Parsons would have had to pay, if he had undertaken to forward the cargo for his own account. A copy of said stipulation is hereunto annexed, marked Exhibit "A," and made a part of this libel. 281

FOURTH.—That libellant despatched its steamship *Abbazia* to Port Empedocle, Girgenti, where she arrived on or about the 24th day of August, 1898, and pursuant to the terms of said stipulation, thereafter paid the charges in Sicily against said brimstone, and loaded it, and on or about September 4th, proceeded therewith to the port of New York. 282

The *Abbazia* was wrongfully detained for a period of three days over and above the time she would have ordinarily and otherwise have consumed in loading said cargo of brimstone, solely by reason of the failure of the shippers of said brimstone, which is the subject of this libel, and of said Schuyler L. Parsons and his agents, to furnish said brimstone for shipment at Port Empedocle, or to give the proper instructions and facilities for its loading, or make the necessary arrangements in accordance with the stipulation hereto annexed. That the reasonable value of the use per day of the steamship *Abbazia* is $125, and the detention chargeable against said brimstone, therefore, amounts to $375. 283

That the libellant laid out and expended certain sums for unloading and landing said sulphur from the *Styria*, also for the storage, lighterage, watching, legal expenses and loading of said cargo, as well as other incidental charges, all of which were necessary and reasonable, and expended for the benefit of said cargo, and on its credit, and for its preservation, and in accordance with the terms of the bills of lading issued therefor, both by the *Styria* and the *Abbazia*, by the terms of the stipulation hereto annexed, and by the 284

285 maritime law, were and are a charge and lien against said brimstone, enforceable by this Court. Said charges and expenses amount to about $1,300. The steamship *Abbazia* has now arrived at the port of New York, and has discharged or will be discharging said brimstone during the currency of this process into lighters at the foot of Forty-second-street, Brooklyn, and payment of the charges and expenses herein set forth has been demanded of the consignees, and refused.

286 FIFTH.—That said brimstone is now within the jurisdiction of this Honorable Court, and subject on behalf of libellant to a lien, by the general maritime law, and by virtue of said stipulation and bills of lading for all the charges and expenses herein set forth.

SIXTH.—All and singular the premises of this libel are true, and within the admiralty and maritime juris diction of this Honorable Court.

287 Therefore, libellant prays that process in due form of law may issue against said brimstone, and that the same may be condemned and sold to pay the said claim, and that all persons intervening for their interest therein may be cited to appear and answer all and singular the matters aforesaid, and for such other and further relief as it may be entitled to receive

CONVERS & KIRLIN,
Proctors for Libellant.

288 SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss.:

E. B. CONVERS, being duly sworn, deposes and says that he is one of the proctors for the libellant herein; that the foregoing libel is true to the best of his knowledge, information and belief, derived from statements made by the masters of the steamships *Abbazia* and *Styria*, and that the reason this verification is not made by the libellant is that it is a foreign corporation, with its principal office at Trieste, Austria,

and none of its officers resides or is now within the district, or within one hundred miles of the place of trial. 289

E. B. Convers.

Sworn to before me this day of , 1898.

James T. Kilbreth,
[seal.] Notary Public,
New York County.

[Endorsed:]—Libel filed Oct. 1, 1898. 290

To the Honorable Addison Brown, United States District Judge for the Southern District of New York:

The answer of Schuyler L. Parsons, claimant of the 4,550 cantors of Brimstone to the libel of Austro-Americana Steamship Company, against said merchandise, in a cause of contract, civil and maritime, alleges as follows: 291

First.—He admits the allegations of the first paragraph of the libel and those of the second concerning the shipment of said brimstone; but he denies that by the declaration of war between the United States of America and the Kingdom of Spain, the said brimstone became or was contraband of war on the 27th day of April, 1898. He denies that the action of the master of the *Styria* in discharging the said brimstone at Port Empedoele, was in accordance with the terms of the bill of lading, or was within the rights of the master of said *Styria;* but he admits the allegation as to the discharge of said brimstone. 292

Second.—He admits that the bill of lading contains a clause excusing the master from delivering said brimstone as agreed in and by said bill of lading in case del very was prevented by the restraint of princes and rulers or people; but he alleges that the said ex-

293 ception in no way authorized or permitted the said master to act as he did in regard to said brimstone, and that the said exception had no application to the facts of this case as they existed; and he denies that the master of said *Styria* was in any just or moral sense, or in any legal way whatsoever prevented from making right and true delivery of said brimstone at the Port of New York, on the voyage for which said brimstone was shipped; and he alleges further that the said master in discharging said brimstone at Port
294 Empedocle was not influenced at all by said clause or by any of the causes or reasons therein mentioned, or even by fear thereof.

And claimant denies that the outbreak of war between the United States and Spain rendered the transportation of said brimstone to New York unlawful.

He denies that if said voyage had been attempted, the cargo of brimstone or the *Styria* would have been liable to seizure by Spanish war vessels, or that even if there had been such risk, the same would have
295 amounted to "restraint of princes, rulers or people" within the true meaning of said bill of lading, and that it released the said ship from any obligation to transport said brimstone.

THIRD.—Claimant admits that the *Styria* after the delivery of said brimstone, loaded a cargo of fruit, and he alleges that the master of said vessel put the said cargo of brimstone overboard on purpose to enable him to carry said cargo of fruit, which was a more lucra-
296 tive cargo to carry for the ship in the way of freight; he admits the arrival of said vessel at New York, her arrest in the suit in this Court mentioned in the libel herein; the giving of stipulations and the release of said vessel. He admits the making of the stipulation referred to and set forth as Exhibit "A" to the libel; but the meaning and effect thereof as stated by the libellant he disputes and avers that the same is for this Court to construe.

FOURTH.—Claimant admits that the said brimstone,

but not all thereof, was brought forward from Girgenti 297
to New York by the *Abbazia*; but he denies that the said ship was detained at Girgenti by any act or negligence of the shippers of said brimstone or of claimant or his agents; and he denies that $123. is the reasonable value of the use of said vessel per day, and that said or any other sum for detention is chargeable against said brimstone.

And claimant has no knowledge or information sufficient to form a belief as to the sums alleged by libellant to have been disbursed; and he denies that they 298
were fair and proper charges in any way chargeable against said brimstone, or were or are a lien upon the same.

And claimant further answering and repeating the allegations, admissions and denials of the foregoing defenses, alleges:

First.—That the said ship *Styria* began loading said brimstone on the 21st day of April, 1898; that the said master then knew that there was imminent probability 299
of a state of war between the United States and Spain; that he continued loading said sulphur until on the 21st day of April, 1898, when said loading was completed, and the said *Styria* cleared from said port of Girgenti for New York; that thereupon the master of said vessel received orders from Burrell & Sons, of Bologna, the managing owners of said vessel, to discharge the said sulphur and take a cargo of green fruit at Palermo, Italy, for New York; that thereupon said master began to discharge said sulphur at 300
the place where it was loaded, without departing from said port; that he gave no word to the shippers thereof, or to the claimants or owners thereof, of his intention to discharge the same, and not until the 7th day of May, 1898, when the said sulphur was all unloaded, did he, said master, notify the shippers, owners or consignees thereof concerning either his intention or his actions regarding the same.

And claimant further says that the said unloading was in (gross and immoral) disregard and in violation

301 of the contract of carriage and the duties of said master. That the carriage of said brimstone was not unlawful or illegal, and did not render the said ship liable to seizure ; that as a matter of fact, prior to the declaration of war by Spain, the question of whether sulphur from Italian ports to the United States was contraband or not, was a matter of public discussion, and that almost immediately upon the declaration of hostilities, it was publicly known and reported in the daily papers of Italy, particularly in those parts and
302 ports whence sulphur was commonly exported, and was generally discussed among shipping people at such places and at the consulates and prefectures in such ports and places, that the Spanish Government would not hold to be contraband of war crude sulphur shipped on neutral vessels from Italian ports; all of which public news and discussions were known to the said master, and if not, ought to have been;—that at least it was his duty (and common honesty) before unloading the said goods, having issued his negotiable bill of lading
303 therefor, to have notified those with whom he had contracted regarding the carriage of the same ; before unloading the same ; that it was his duty in view of the public negotiations then pending for the freedom of sulphur, to have waited a reasonable time for said negotiations to bear fruit; that as a matter of fact on and prior to the 20th day of April, 1898, the Spanish Government had notified the Italian Government that it would not seize crude sulphur in neutral vessels destined for United States
304 ports, shipped from Italy ; that said information was well known to said master ; and was publicly disseminated by the Italian newspapers and public officials.

That prior to the completed discharge of said sulphur and to the time of sailing from said port of Girgenti, there was not even the (false) excuse of fear of restraint of princes, rulers of people, regarding the said sulphur available to the said master, as upon the 6th day of May, 1898, public notice was conveyed to said master that sulphur from Italy in neutral ships

destined for United States ports would not be molested by Spanish vessels, and as a fact, although at various dates between the 20th of April and the 11th of May, 1898, several neutral ships sailed from said port of Girgenti with sulphur for United States ports, not one of them was even overhauled by any Spanish vessel on account of carrying sulphur. 305

Claimant further says that at no time was there any interdict or blockade of the Port of New York, either notified or *de facto*, preventing the entry of the *Styria* or the discharge of her cargo therein; nor was it ever for any reason during the said war, unsafe for any vessel to enter or discharge there; and as a fact the *Styria* did sail for and arrive at and enter and discharge at the said port of New York, on or about the day of June, 1898. 306

SECOND.—Claimant alleges that no clause of the bill of lading exempting the said ship from the liability to transport the said brimstone, or authorizing it to break the voyage, as agreed by said bill of lading, and the said transportation not being illegal, the vessel was absolutely bound to bring forward the said merchandise, or pay the damage for her failure so to do, and that she cannot lawfully charge the expenses of her wrongful, illegal and improvident undelivery upon the claimant. 307

THIRD.—Claimant further avers that the libellant ought not to maintain its action, because having issued the bill of lading, its exceptions look to a transportation and discharge at a port nearby to the port of discharge and not to a discharge to evade transportation. 308

All and singular the premises of this answer are true.

Wherefore, claimant prays that the said libel may be dismissed with costs, or that such other decree may be made as justice and right dealing may require.

BOWERS & SANDS,
Proctors for Claimant.

309 SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss.:

SCHUYLER L. PARSONS, being duly sworn, says: I am the agent of the plaintiff in this suit; I have read the foregoing answer and know the contents thereof and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters I believe it to be true. My knowledge and information are
310 derived from the papers as the matters which have been in case; from the correspondence between the parties and their agents; from the Italian newspapers published in Sicily and from public events. The claimant is not within the County of New York where in I reside.

SCHUYLER L. PARSONS.

Sworn to before me this 31st }
day of December, 1898. }

WILLIAM C. BOWERS,
311 Notary Public,
N. Y. County.

[Endorsed:]—Answer filed, December 31, 1898.

312

313 To the Honorable ADDISON BROWN, United States District Judge, for the Southern District of New York:

The libel of Austro-Americana Steamship Company, owner of the steamships *Styria* and *Abbazia*, against 1,500 tons of brimstone, owned by Alfred S. Malcolmson, *ex*-steamship *Abbazia*, in a cause of contract, civil and maritime, alleges as follows:

FIRST.—The libellant, Austro-Americana Steamship Company, is a corporation organized and existing under the laws of the Austro Hungarian Empire, with its principal office at Trieste, and owner of the Austro-Hungarian Steamships *Styria* and *Abbazia*. 314

SECOND.—That on or about the 21st day of April, 1898, there was shipped by Emil Fog & Sons on board the steamship *Styria*, at the port of Girgenti, in the Kingdom of Italy, a quantity of crude brimstone in bulk, said by the shippers to consist of 1,500 tons, to be delivered at the port of New York, to the Canadian 315 Bank of Commerce, subject to certain terms, conditions and exceptions set forth in the bills of lading issued therefor by said vessel.

On or about the 27th day of April, 1898, after said brimstone had been loaded, war having been declared between the United States and Spain, whereby said brimstone became and was contraband of war, the master of the *Styria*, in accordance with the terms of the bills of lading issued for the brimstone, and with his rights under the 316 law, caused said brimstone to be discharged from the *Styria* and placed in store with a mercantile agent at the port of Empedocle, the seaport of Girgenti, and at the shippers' risk and expense, and deposited in the Post-Office a letter addressed to the shippers, and to the consignees of the merchandise, stating that the goods had been landed, and with whom deposited, and were at the shippers' risk and expense.

That the bills of lading, issued for the brimstone, contained the following exception:

317 "Restraint of princes and rulers or people * * * excepted."

That the outbreak of war between Spain and the United States, rendered the transportation of said brimstone to New York unlawful as contraband of war, and that if said voyage had been attempted, the cargo of brimstone and the *Styria* would have been liable to seizure by Spanish war vessels, and said risk of seizure therefore amounted to a "restraint of princes, rulers or people," and, therefore, released the vessel
318 from any obligation to transport said brimstone.

THIRD.—Thereafter, the *Styria* loaded a cargo of fruit, and proceeded to the port of New York, where, on her arrival on or about June, 28th, 1898, she was arrested in the libel suit, now pending in this Court, of Alfred S. Malcolmson, as owner of said brimstone, against said vessel, for the non delivery thereof, in which damages were claimed in the sum of $50,000. Stipulations for value and costs were duly filed by
319 Antonio G. Scopinich, as master and claimant, acting in behalf of this libellant, and said vessel was thereupon released from the custody of the marshal.

Thereafter, a stipulation was entered into on the 12th day of August, 1898, between the proctors for the said Malcolmson and the proctors for the steamship *Styria* and this libellant, providing that the claimant of the *Styria*, acting for this libellant, should forward the brimstone before mentioned, landed at the port of Empedocle, on the first available steamer from that
320 port to New York, and on delivery of same to the consignees, upon the terms specified in the original bills of lading, freight to be paid by the consignees, and the goods upon arrival to be sold and proceeds credited on account of damages, if any, in that suit. It was also provided that the claimant should have a lien on said brimstone for the charges in Sicily against the respective portions, provided claimant was justified in re-landing and storing the cargo as and when he did; all of which was without prejudice, it being the purpose of the stipulation that the claimant and this libellant should have a lien on the brimstone for the charges

and expenses against the same, which the libellant Malcolmson would have had to pay, if he had undertaken to forward the cargo for his own account. A copy of said stipulation is hereto annexed. marked Exhibit "A," and made a part of this libel. 321

FOURTH.—That libellant despatched its steamship *Abbazia* to Port Empedocle, Girgenti, where she arrived on or about the 24th day of August, 1898, and pursuant to the terms of said stipulation, thereafter paid the charges in Sicily against said brimstone, and loaded it, and on or about September 4th proceeded therewith to the port of New York. 322

The *Abbazia* was wrongfully detained for a period of three days over and above the time she would have ordinarily and otherwise have consumed in loading said cargo of brimstone, by reason of the failure of the shippers of said brimstone, which is the subject of this libel, and of said Alfred S. Malcolmson and his agents, to furnish said brimstone for shipment at port Empedocle, or to give the proper instructions and facilities for its loading, or make the necessary arrangements in accordance with the stipulation hereto annexed. That the reasonable value of the use per day of the steamship *Abbazia* is $125, and the detention chargeable against said brimstone, therefore, amounts to $375. 323

That the libellant laid out and expended certain sums for unloading and landing said sulphur from the *Styria*, also for the storage, lighterage, watching, legal expenses and loading of said cargo, as well as other incidental charges, all of which were necessary and reasonable, and expended for the benefit of said cargo, and on its credit, and for its preservation, and in accordance with the terms of the bills of lading issued therefor, both by the *Styria* and the *Abbazia*, by the terms of the stipulation hereto annexed, and by the maritine law, were and are a charge and lien against said brimstone enforceable by this Court. Said charges and expenses amount to about $5,625. The steamship *Abbazia* has now arrived at the port of New York, and has discharged or will be discharging said brimstone during the currency of 324

325 this process, into lighters at the foot of Forty-second street, Brooklyn, and payment of the charges and expenses herein set forth has been demanded of the consignees, and refused.

Fifth.—That said brimstone is now within the jurisdiction of this Honorable Court, and subject on behalf of libellant, to a lien, by the general maritime law, and by virtue of said stipulation and bills of lading for all the charges and expenses herein set forth.

326 Sixth.—All and singular the premises of this libel are true, and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libellant prays that process in due form of law may issue against said brimstone, and that the same may be condemned and sold to pay the said claim, and that all persons intervening for their interest therein may be cited to appear and answer all and singular the matters aforesaid, and for such other and further relief as it may be entitled to receive.

327

Convers & Kirlin,
Proctors for Libellant.

Southern District of New York, }
City and County of New York, } ss.:

E. B. Convers, being duly sworn, deposes and says that he is one of the proctors for the libellant herein; that the foregoing libel is true to the best of his knowledge, information and belief, derived from statements made by the masters of the steamships *Abbazia* and
328 *Styria*, and that the reason this verification is not made by the libellant is that it is a foreign corporation, with its principal office at Trieste, Austria, and none of its officers reside or are now within the district, or within one hundred miles of the place of trial.

E. B. Convers.

Sworn to before me this 30th }
day of September, 1898. }

James T. Kilbreth,
Notary Public,
New York County.

[Endorsed:]—Libel filed Oct. 1, 1898.

329

UNITED STATES DISTRICT COURT, Southern District of New York, } ss.:

AUSTRO-AMERICANA STEAMSHIP COMPANY

AGAINST

1500 Tons Brimstone, *ex* Steamship "ABBAZIA."

330

The answer of Alfred S. Malcolmson, owner and claimant of said brimstone, to the libel of the Austro-Americana Steamship Company, the libellant herein, alleges and shows to the Court as follows:

FIRST.—This claimant has no knowledge as to the allegations in Article First of said libel contained, and requires proof thereof.

331

SECOND.—Claimant admits that on or about April 21st, 1898, 1500 tons of brimstone were shipped on board the steamship *Styria*, at the port of Girgenti, to be delivered at the port of New York, to the Canadian Bank of Commerce, subject to the terms of certain bills of lading issued therefor, as alleged in the libel; and that on or about April 27th the master of the *Styria* caused said brimstone to be discharged from the *Styria*, and placed in store at the port of Empedocle and notified the consignees of the merchandise that said brimstone had been so discharged; but denies that said master so acted in accordance with the terms of the bill of lading issued for said brimstone, or with his rights under the law, and alleges that the discharge of said brimstone was altogether wrongful and without justification.

332

Admits that the bills of lading issued for said brimstone contain the exception of restraint of princes and rulers or people, and admits that war had broken out

333 between the United States and Spain, but denies that at the time of the discharge of said brimstone the transportation thereof to New York was unlawful, and that the *Styria* or said cargo would have been liable to seizure by Spanish war vessels, and denies that there was any risk of seizure or any restraint of princes, rulers or people, or any other matter, cause or thing which released the vessel from its obligation to transport said brimstone. And this claimant further alleges that at the time when said brimstone was discharged
334 the master of the *Styria* had notice that an agreement had been reached between the Italian and Spanish Governments by which the Spanish Government had agreed not to interfere with the export of brimstone from Italian ports, which agreement had, in fact, actually been made, but in spite of such notice and in violation of his duty, he caused said brimstone to be discharged without any excuse for such action.

THIRD.—Admits that thereafter the *Styria* loaded a
335 cargo of fruit and proceeded to the port of New York, that on or about June 28th, 1898, she was arrested in a suit brought by this claimant as libellant against said vessel for failure to deliver said brimstone, in which damages were claimed in the sum of $50,000, and admits that stipulations for value and costs were duly filed by the master of said vessel, and that she was thereupon released from the custody of the marshal. Claimant also admits that the stipulation alleged in Article Three of the libel was entered into between the
336 Proctors for this claimant and the Proctors for said steamship.

FOURTH.—Admits that the steamship *Abbazia* loaded said brimstone at the port of Empodcle, and on or about September 4th, 1898, proceeded therewith to the port of New York Admits that she arrived at New York and has discharged said brimstone and that payment of certain charges and expenses has been demanded of the consignees and refused; but denies that the *Abbazia* was wrongfully detained for any period by

reason of any failure or neglect of this claimant or his agents; and denies that the libellant has any claim against said brimstone for any demurrage on account of any delay of said vessel. 337

As to the other allegations contained in Article Fourth of the libel, claimant has no knowledge and requires proof thereof.

FIFTH.—Admits that said brimstone is now within the jurisdiction of this Court, but denies that it is subject to any lien on behalf of libellant, either by general maritime law or by virtue of any stipulation or bill of lading for any charges or expenses or any other sum. 338

Wherefore the claimant prays that this Honorable Court will pronounce against the demand of the libellant, in its libel before mentioned, with costs.

ALFRED S. MALCOLMSON,
Claimant.

SULLIVAN & CROMWELL,
Proctors for Claimant.

339

STATE OF NEW YORK, }
County of New York, } ss.:

ALFRED S. MALCOLMSON, being duly sworn, deposes and says that he is the claimant herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

340

ALFRED S. MALCOLMSON.

Sworn to before me this }
7th day of October, 1898. }

EDWARD T. McLAUGHLIN, JR.,
Notary Public No. 21,
New York County,
New York.

[Endorsed:]—Answer filed Oct. 8, 1898.

341 To the Honorable ADDISON BROWN, United States District Judge, for the Southern District of New York:

The libel of Austro-Americana Steamship Company, owner of the steamships *Styria* and *Abbazia*, against one hundred tons of brimstone, owned by John Munroe & Co., *ex* steamship *Abbazia*, in a cause of contract, civil and maritime, alleges as follows:

342 FIRST.—The libellant, Austro-Americana Steamship Company, is a corporation, organized and existing under the laws of the Austro-Hungarian Empire, with its principal office at Trieste, and owner of the Austro-Hungarian steamships *Styria* and *Abbazia*.

SECOND.—That on or about the 24th day of April, 1898, there was shipped by F. Amato & Co., on board the steamship *Styria*, at the port of Girgenti, in the kingdom of Italy, a quantity of crude brimstone in
343 bulk, said by the shippers to consist of one hundred tons, to be delivered at the port of New York to the order of John Munroe & Co., subject to certain terms, conditions and exceptions set forth in the bills of lading issued therefor by said vessel,

On or about the 27th day of April, 1898, after said brimstone had been loaded, war having been declared between the United States and Spain, whereby said brimstone became and was contraband of war, the master of the *Styria*, in accordance with the terms of
344 the bills of lading issued for the brimstone, and with his rights under the law, caused said brimstone to be discharged from the *Styria* and placed in store with a mercantile agent at the port of Empedocle, the seaport of Girgenti, and at the shippers' risk and expense, and deposited in the Post Office a letter addressed to the shippers, and to the consignees of the merchandise, stating that the goods had been landed, and with whom deposited, and were at the shippers' risk and expense.

That the bills of lading issued for the brimstone

contained the following exception: "Restraint of 345
princes and rulers or people * * * excepted."

That the outbreak of war between Spain and the United States rendered the transportation of said brimstone to New York unlawful as contraband of war, and that if said voyage had been attempted, the cargo of brimstone and the *Styria* would have been liable to seizure by Spanish war vessels, and said risk of seizure therefore amounted to a "restraint of princes, rulers or people," and therefore released the vessel from any obligation to transport said brimstone. 346

THIRD.—Thereafter the *Styria* loaded a cargo of fruit, and proceeded to the port of New York, where, on her arrival, on or about the 28th of June, 1898, she was arrested in the libel suit, now pending in this Court, of John Munroe *et al.*, as owners of said brimstone, against said vessel, for the non-delivery thereof, in which damages were claimed in the sum of $3,400. Stipulations for value and costs were duly filed by Antonio G. Scopinich, as master and claimant, acting 347
in behalf of this libellant, and said vessel was thereupon released from the custody of the marshal.

Thereafter a stipulation was entered into on the 12th day of August, 1898, between the proctors for the said John Munroe *et al.*, and the proctors for the steamship *Styria*, and this libellant, providing that the claimant of the *Styria*, acting for this libellant, should forward the brimstone before mentioned, landed at the port of Empedocle, on the first available steamer from that port to New York, and on delivery of same to the 348
consignees, upon the terms specified in the original bills of lading, freight to be paid by the consignees, and the goods upon arrival to be sold and proceeds credited on account of damages, if any, in that suit. It was also provided that the claimant should have a lien on said brimstone for the charges in Sicily, against the respective portions, provided claimant was justified in re-landing and storing the cargo as and when he did; all of which was without prejudice, it being the purpose of the stipulation that the claimant and this

349 libellant should have a lien on the brimstone for the charges and expenses which the libellants, Munroe *et al.*, would have had to pay if they had undertaken to forward the cargo for their own account. A copy of said stipulation is hereto annexed, marked Exhibit A, and made a part of this libel.

Fourth.—That libellant dispatched its steamship *Abbazia* to Port Empedocle, Girgenti, where she arrived on or about the 24th day of August, 1898, and
350 pursuant to the terms of said stipulation, thereafter paid the charges in Sicily, against said brimstone, and loaded it, and on or about September 4th, proceeded therewith to the port of New York

That the libellant laid out and expended certain sums for unloading and landing of said sulphur from the *Styria*, also for the storage, lighterage, watching, legal expenses and loading of said cargo, as well as other incidental charges, all of which were necessary and reasonable, and expended for the benefit of said
351 cargo, and on its credit, and for its preservation, and in accordance with the terms of the bills of lading issued therefor, and by the terms of the stipulation hereto annexed, and by the maritime law were and are a charge and lien against said brimstone enforceable by this Court. Said charge and expenses amount to about the sum of Three hundred and seventy-five dollars ($375.00). The steamship *Abbazia* has now arrived at the port of New York, and has discharged or will be discharging said brimstone during the currency of
352 this process, into lighters, at the foot of Forty-second street, Brooklyn, and payment of the charges and expenses herein set forth has been demanded of the consignees and refused.

Fifth.—That said brimstone is now within the jurisdiction of this Honorable Court, and subject on behalf of libellant, to a lien, by the general maritime law and by virtue of said stipulation and bills of lading, for all the charges and expenses herein set forth.

SIXTH.—All and singular the premises of this libel are true, and within the admiralty and maritime jurisdiction of this Honorable Court. 353

Wherefore libellant prays that process in due form of law may issue against said brimstone, and that the same may be condemned and sold to pay the said claim, and that all persons intervening for their interest therein, may be cited to appear and answer all and singular the matters aforesaid, and for such other and further relief as it may be entitled to receive. 354

CONVERS & KIRLIN,
Proctors for Libellant.

SOUTHERN DISTRICT OF NEW YORK, } ss.:
City and County of New York, }

E. B. CONVERS, being duly sworn, deposes and says, that he is one of the proctors for the libellant herein; that the foregoing libel is true to the best of his knowledge, information and belief, derived from statements made by the masters of the steamships *Abbazia* and *Styria*, and that the reason this verification is not made by the libellant is that it is a foreign corporation with its principal office at Trieste, Austria, and none of its officers reside or is now within the district, or within 100 miles of the place of trial. 355

E. B. CONVERS.

Sworn to before me this 30th day of September, 1898.

JAMES T. KILBRETH,
[L. S.] Notary Public, 356
New York County.

[Endorsed:]—Libel filed Oct. 1, 1898.

357 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

AUSTRO-AMERICANA STEAMSHIP COMPANY

AGAINST

358 One Hundred Tons Brimstone, *ex* Steamer "ABBAZIA."

The answer of John Munroe, Henry W. Munroe, Edgar Lockwood and Frederick de Reiset, bankers doing business in the City of New York under the firm name of John Munroe & Company, owners and claimants of said brimstone, to the libel of the Austro-Americana Steamship Company, libellant, herein al-
359 lege and show to the Court as follows:

FIRST.—This claimant has no knowledge as to the allegations in article first of said libel contained, and requires proof thereof.

SECOND.—Claimant admits that on or about April 21st, 1898, 100 tons of brimstone were shipped on board the steamship *Styria* at the port of Girgenti to be delivered at the port of New York to the claimants subject to the terms of certain bills of lading issued therewith,
360 as alleged in the libel, and that on or about the 27th day of April, 1898, the master of the *Styria* caused said brimstone to be discharged from the *Styria* and placed in store at the port of Empedocle, and notified the consignees of the merchandise that the said brimstone had been so discharged, but deny that said master so acted in accordance with the terms of the bill of lading issued for said brimstone or within his rights under the law, and allege that the discharge of said brimstone was altogether wrongful and without justification.

Admit that the bill of lading issued for said brim- 361
stone contained the exception of restraint of princes and rulers or people, and admit that war had broken out between the United States and Spain, but deny that at the time of the discharge of said brimstone, transportation thereof to New York was unlawful and that the *Styria* or said cargo would have been liable to seizure by Spanish war vessels, and deny that there was any risk of seizure, or any restraint of princes, rulers or people, or any other matter, cause or thing, which released the vessel or the persons in con- 362
trol thereof from its or their obligation to transport said brimstone.

And these claimants further allege that at the time when said brimstone was discharged the master of the *Styria* had notice that an agreement had been reached between the Italian and Spanish governments by which the Spanish government had agreed not to interfere with the export of brimstone from Italian ports, which said agreement had in fact actually been made, but in spite of such notice and in violation of 363
his duty said master caused said brimstone to be discharged without any lawful excuse for such action.

THIRD.—Admit that thereafter the *Styria* loaded a cargo of fruit and proceeded to the port of New York, and that on or about June 28, 1898, she was arrested in a suit brought by these claimants as libellants against said vessel for failure to deliver said brimstone, in which damages are claimed in the sum of three thousand four hundred dollars ($3,400), with interest 364
thereon from the 24th day of April, 1898, and admit that stipulations for value and costs were duly filed by the master of said vessel, and that she was thereupon released from the custody of the marshal.

Claimants also admit that the stipulation alleged in article three of the libel was entered into between the proctors for these claimants and the proctors for said steamship.

FOURTH.—Admit that the steamship *Abbazia* loaded

said brimstone at the port of Empedocle, and on or about September 4th, 1898, proceeded therewith to the port of New York; admit that she has arrived at New York and has discharged said brimstone, and that the payment of certain charges and expenses has been demanded of the claimants and refused, but deny that the *Abbazia* was wrongfully detained for any period by reason of any failure or neglect of these claimants, or their agents, and deny that the libellant has any claim against said brimstone for any demurrage on account of any delay to said vessel.

As to the other allegations contained in article fourth of the libel, claimants have no knowledge and require proof thereof.

FIFTH.—Admit that said brimstone was at the time of the filing of the said libel within the jurisdiction of this Court, but deny that it was or is subject to any lien on behalf of libellant other than by general maritime law or by virtue of any stipulation or bill of lading for any charges or expenses, or any other sum

Wherefore, claimants pray that this Honorable Court will pronounce against the demand of the libellant in this libel, before mentioned, with costs.

JOHN MUNROE & Co.,
Claimants.

STERN & RUSHMORE,
Proctors for Claimants,
40 Wall Street, New York City.

STATE OF NEW YORK, }
County of New York. } ss.:

EDGAR LOCKWOOD, being duly sworn, deposes and says that he is one of the members of the firm of John Munroe & Co., the claimants herein; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon infor-

mation and belief, and that as to those matters he be- 369
lieves it to be true

EDGAR LOCKWOOD.

Sworn to before me this
7th day of January, 1899.
S. INGERSOLL KELTON,
Notary Public,
Kings County.

Certificate filed in New York County.

[Endorsed:]—Answer filed January 9, 1899. 370

Before HON. ADDISON BROWN, U. S. District Judge,
February 14, 1898.

APPEARANCES:

Messrs. COWEN, WING, PUTNAM & BURLINGHAM, for James L. Morgan *et al.* and 250 tons of brimstone.
Messrs. SULLIVAN & CROMWELL—Mr. Hill for Alfred S. Malcomson and a quantity of brimstone. 371
Messrs. BOWERS & SANDS—Mr. Reed for Schuyler L. Parsons *et al.* and a quantity of brimstone.
Messrs. STERN & RUSHMORE—Mr. Regensburger for John Munroe & Company and a quantity of brimstone.
Messrs. CONVERS & KIRLIN for the *Styria* and the Austro-Americana Steamship Company.

The allegations of the various libels, cross libels and answers are stated by counsel. 372

MR. KIRLIN offers in evidence the deposition of ANTONIO G. SCOPINICH, master of the *Styria*, and reads in evidence:

Letter from the master to the shippers of sulphur, dated April 27, 1898.

(Marked *Styria's* Exhibit 1.)

Protest of John Sofio & Company, dated May 2, 1898.

(Marked *Styria's* Exhibit A.)

373 Answer of the master thereto.

(Marked *Styria's* Exhibit B.)

Answer of the master, dated May 5, 1898.

(Marked *Styria's* Exhibit B.)

Bill of lading offered in evidence in connection with said deposition.

(Claimant's Exhibit 5, June 8, 1898.)

374 Stipulation entered into between the parties August 12, 1898, providing for the shipment of the sulphur, etc.

(Marked *Styria's* Exhibit C.)

Deposition of Henry de Thianich, master of steamship *Abbazxia*.

Deposition of Captain Scopinich, re called.

Deposition of Thianich, re called.

Stipulation entered into between the parties provid-
375 ing for the reading of certain documents which are annexed to the stipulation.

(Marked *Styria's* Exhibit D.)

Mr. Kirlin: Pursuant to the terms of that stipulation I offer in evidence the letter and telegrams annexed to the stipulation.

(Marked from 1 to 16 inclusive.)

Objected to.

The Court: They should come in on rebuttal
376 if at all.

Mr. Kirlin: Pursuant to the stipulation I read in evidence the decree of the Queen of Spain, dated April 23, 1898, in Spanish, from the "Gaceta," of Madrid, published April 24, 1898.

(Marked *Styria's* Exhibit E.)

Translation of the decree which appears in the London "Gazette" of May 3, 1898.

(Marked *Styria's* Exhibit E 1.)

Robert Hunter. 377

Counsel for *Styria* offers in evidence the proclamation of neutrality of the Queen of England, dated April 23, 1898, as published in the London "Gazette" of April 26, 1898.

Objected to. Excluded.

Counsel for *Styria* offers to read from advance sheets of the Consular reports, dated May 10, 1898, from the State Department, respecting the publication in the 378
London "Gazette" of the decree of the Queen of Spain.

Objected to. Excluded.

It is admitted that the Spanish proclamation of war was communicated to the different governments officially in due course, and that the Queen of England issued her proclamation in reference to the neutrality laws on the 23rd of April.

Counsel for *Styria* offers in evidence the pro- 379
tests served by each one of the shippers named in the libels and the answer to such protests by the master.

(Marked *Styria's* Exhibits F 1 to F .)

Trial notes, pp. 2[illegible]–36.

Counsel for *Styria* offers in evidence statement furnished by counsel for Malcomson showing amount realized by them in New York for their sulphur.

(Marked *Styria's* Exhibit G.) 380

Robert Hunter, being duly sworn and examined as a witness on behalf of the *Styria*, testifies:

By Mr. Kirlin:

Q. Are you a Clerk in the Custom House? A. Yes, sir.

Q. Have you produced pursuant to a subpœna *duces*

381 Robert Hunter.

tecum the entry of Malcomson for sulphur brought forward by the steamship *Abazzia?* A. I have, sir.

By the Court:

Q. Entry of what date? A. September 30, 1898.

Mr. Kirlin: It is liquidated October 25, 1898.

382 By Mr. Kirlin:

Q. Is the Consular invoice attached? A. Yes, sir; those two papers are attached.

Q. Two bills of lading? A. Two bills of lading.

Counsel for *Styria* offers the Consular invoice and bills of lading.

It is admitted that the Consular invoice produced is the Consular invoice for the sulphur that was shipped on the *Styria*.

383 By the Court:

Q. What is the total value of the goods billed to Malcomson, according to that entry? A. $27,246.

By Mr. Hill:

Q. That is on one bill of lading? A. Both bills of lading are attached to it.

By Mr. Kirlin:

Q. Does that include the sulphur under both bills of lading? A. Yes, sir.

384 Q. Have you also produced the entry of Munroe & Co? A. Yes, sir.

Q. Do you produce the entry now? A. Yes.

Q. Is the bill of lading annexed to the entry? A. Yes, there is one bill of lading and one invoice.

Q. What is the amount of the invoice in dollars? A. $2,329.

Q. Do you also produce the entry of James L. Morgan & Company? A. Yes.

Q. Bill of lading and invoice? A. Yes, sir.

Q. What is the invoice value of that lot in dollars? A. $4,279, or 22,174 lire.

Q. Does that take account of depreciation in lire? A. That seems to be the full value.

Q. Do you also produce the entry of Parsons & Pettit? A. Yes.

Q. How many bills of lading are there there? A. Two bills of lading and two invoices.

Q. What is the total invoice there shown in dollars? A. $6,925.

Deposition of ANTONIO G. SCOPINICH taken on behalf of claimant before James T. Kilbreth, Notary Public, New York, on the 8th day of June, 1898, pursuant to notice.

Present—Messrs. CONVERS & KIRLIN (by Mr. Kirlin) for Claimant.

Messrs. COWEN, WING, PUTNAM & BURLINGHAM (by Mr. Burlingham) for Libellant James L. Morgan *et al.*

Messrs. SULLIVAN & CROMWELL (by Mr. Hill) for Libellant Alfred S. Malcomson.

Messrs. BOWERS & SANDS (by Mr. L. G. Reed) for Libellant Schuyler L. Parsons.

Messers. STERN & RUSHMORE (by Mr. M. M. Regensburger) for Libellant John Munroe *et al.*

ANTONIO G. SCOPINICH, called on behalf of claimant, being duly sworn, in each of the above entitled causes, testifies as follows:

DIRECT EXAMINATION by Mr. Kirlin:

Q. Captain, are you the master of the *Styria*? A. Yes.

389 Q. She is an Austrian steamship? A. She is.

Q. By whom is she owned? A. She is owned by Schenker & Co., of Vienna, and also part owned by Burrell & Son, of Glasgow.

Q. Where is the vessel's home port? A. Trieste.

Q. How old a ship is she? A. She is going on in the sixteenth year; she was built in 1882.

Q. What is the tonnage of the ship? A. (Witness
390 looks in book) Gross tonnage, 3,153 65/100.

Q. Net tonnage? A. The net tonnage is 2,336.

Q. Is she an iron steamship? A. She is an iron steamer.

Q. How long? A. The length I don't know exactly. She is close to 300 feet.

Q. About what is her beam? A. About 38 or 40.

Q. And about what depth of hold? A. She is about 24—23 or 24.

Q. How many decks has she? A. Three-decked
391 ship.

Q. Compound engines? A. Compound engines.

Q. What is her speed? A. Her speed is according to how much coal you burn. She goes 9 and she goes 10½.

Q. You were master on this last voyage from Sicily? A. Yes, ever since we left Trieste.

Q. When did you leave Trieste? A. (Witness looks in book). We left Trieste on the 16th of April, I believe.

392 Q. Was all this brimstone which is in litigation taken at Girgenti? A. Port Empedocle, which is the port of the town of Girgenti.

Q. What time did you reach Port Empedocle? A. At Port Empbdocle we arrived early on the 21st of April.

Q. This present year? A. Yes.

Q. Had you any cargo up to that time? A. We had some cargo in Trieste, not in Girgenti. We started the same day loading.

393

Q. Your cargo from Trieste was to be discharged there, was it? A. No.

Q. I thought you said you started unloading? A. No. We shipped cargo to America in Trieste.

Q. What cargo was that? A. That was magnesite—general cargo—paint.

Q. Where was it stowed? A. Stowed partly down below and partly on deck.

Q. At Port Empedocle you arrived early on the 21st, you say? A. Yes. 394

Q. Who was your agent there? A. William Peirce & Co.

Q. At what time did you begin to take on brimstone at Port Empedocle? A. Early in the afternoon.

Q. Of the 21st? A. Yes.

Q. Did you load from a wharf or from lighters? A. From lighters. You could not get alongside a wharf there.

Q. Who were the shippers of the brimstone at Port Empedocle? A. The shippers were Baller & Co.; Emil Fog & Sons; Florio; John Sofio & Co., and F. Amato & Co. 395

Q. Can you state from recollection how many tons were shipped by each of these shippers? A. Well, I believe there were 250 shipped by Baller, one parcel; and then 100 tons again from Baller, one parcel.

Q. How much from Fog & Son? A. 500 tons.

Q. How much from Sofio? A. 250 tons.

Q. How much from Amato? A. 100 tons. 396

Q. How much from Florio? A. 1,000 tons. Making a total of 2,200 tons.

Q. When was that received—during what days? A. We started and loaded very fast, you understand. Of course, we received one day 300 tons, and another day 500, and up to 1,000, you understand. We had been loading as fast as we could get it.

Q. When was it finished? A. Finished on the 25th. On Sunday. That was the 25th, I believe.

Q. How much did you take on on that last day;

397 do you remember? A. A very few tons—very few; might have been 40 tons, or something like that.

Q. From a lighter also? A. From lighters, yes.

Q. Lying in the roadstead, I suppose? A. In the roadstead—in the harbor, I mean. There is no roadstead there. In the harbor. Because sometimes ships, when they load too much water, they finish in the roadstead; but we finished in the harbor. We had
398 fairly enough water to finish there.

Q. Who gave receipts for the cargo that was shipped? A. The mate should have given them.

Q. Have you seen those yourself? A. I have not seen them.

Q. Do you know on what day they were delivered—the different dates? A. They were delivered accordlng to the lighters that came in—in routine like.

Q. When did you sign the bills of lading? A. I signed them as the parcels were on board, and some of
399 them I signed after the ship was finished.

Claimant's counsel calls for the production of the original bills of lading, notice to produce having been given.

Mr. Burlingham produces bill of lading for 3,250 Sicilian cantars, consigned to Brown Brothers & Co., shipped by John Sofio & Co., dated April 23, 1898, signed by Antonio G. Scopinich,

400 Q. (Said bill of lading shown witness.) Is this your signature? A. Yes.

Said bill of lading marked Claimant's Exhibit 1 Morgan, June 8, 1898.

Mr. Regensburger produces bill of lading for 100 tons of brimstone, dated April 24, 1898, shipped by F. Amato & Co., and consigned to John Munroe & Co.

Said bill of lading, marked Claimant's Exhibit 2 Munroe, June 8, 1898. (Printed as ex-

hibit annexed to libel of John Munroe *et al.* ante p. .)

Mr. Reed produces bill of lading for 3,250 canters, shipped by Ferd. Baller & Co., addressed to order Hambro, said bill of lading being dated April 21, 1898.

Said bill of lading marked Claimant's Exhibit 3 Parsons, June 8, 1898. (Printed as exhibit annexed to libel of Schuyler & Parsons, ante 402 p. .)

Mr. Reed also produces bill of lading for 1,300 cantars, shipped by Ferd. Ballar & Co. to order, the bill of lading being dated April 21, 1898.

Said bill of lading marked Claimant's Exhibit 3a Parsons, June 8, 1898.

Q. Are these your signatures to Claimant's Exhibits 3 and 3a? (Said exhibits shown witness.) A. 403 Yes.

Mr. Hill produces bill of lading for 13,000 cantars of brimstone, shipped by I. & V. Florio, consigned to order of the Canadian Bank of Commerce, the bill of lading being dated April 24, 1898.

Said bill of lading marked Claimant's Exhibit 4 Malcomson, June 8, 1898. (Printed as exhibit annexed to libel of Alfred S. Malcomson, ante p. .) 404

Mr. Hill produces also bill of lading for 6,500 cantars of brimstone, shipped by Emil Fog & Sons to the Canadian Bank of Commerce, the bill of lading being dated April 22, 1898.

Said bill of lading marked Claimant's Exhibit 4a Malcomson, June 8, 1898. (Printed an exhibit annexed to libel of Alfred S. Malcomson, ante p. .)

Claimant's counsel offers all said bills of lading in evidence.

Q. Were all these bills of lading that you signed at Girgenti all on the same printed form? A. Yes, the same thing.

Q. (Paper shown witness.) Is this the form? A. Yes. The company bill of lading, you see.

Said form of bill of lading marked Claimant's Exhibit 5 for identification, June, 8, 1898.

406 Q. Did you also receive from the shipper's bills of lading for each of these lots signed by them? A. Yes.

Q. Where are those bills of lading? A. At the lawyer's at Girgenti—because I handed all documents to him in case they were required, according to his advice.

Q. What is the lawyer's name? A. Antonio Pancamo.

Q. You exchanged bills of lading with the ship-
407 pers? Is that it? A. No. I wouldn't exchange them.

Q. You gave them one signed by you, and they gave you one signed by them? A. Oh, yes, of course.

Q. They were identical otherwise? A. Yes. I gave several copies, you know.

Q. You gave full sets? A. Yes.

Q. And they gave you one only? A. One. That is to say, of course they signed underneath to accept
408 the conditions of the bill of lading.

Q. Look on Claimant's Exhibit 1 and point out at what place they signed? (Said Exhibit 1 shown witness.) A. At the bottom—as far as my memory——

MR. BURLINGHAM: We don't want you to tell what was in them.

Q. They just signed it at the bottom? A. Yes.

Q. Were they in the same form as this? A. The same form.

Q. Did you clear the Custom House at Port Empedocle with this brimstone? A. Yes. 409

Q. On what day? A. I don't remember if it was on Saturday or Sunday, but I believe it was on Saturday night.

By Mr. Burlingham:

Q. The 24th, you mean? A. Yes.

By Mr. Kirlin: 410

Q. Up to the time that you had the last of this brimstone on board, had you received any instructions concerning the voyage from your owner?

Mr. Burlingham: Objected to.

A. When?

Q. Up to the time you had this all on board?

Objected to. Question withdrawn.

Q. Did you sail from Girgenti with the brimstone? 411
A. No.

Q. What did you do with it? A. We put it on shore in the warehouse, by means of lighters.

Q. What was the reason for putting it ashore?

Mr. Hill: Objected to.

A. I acted according to instructions.

Q. Why didn't you bring it on to New York?

Mr. Hill: Objected to. 412

A. In fact, I didn't bring it, because I could see through the newspapers that it was contraband of war, although I acted on the owner's instructions to land the goods; for I would never have sailed with such a cargo, because I might be caught here by the enemy —your enemies, I mean.

Q. You mean by Spain? A. Yes, of course. Those are your enemies now, I suppose.

Q. Did your course towards New York take you

anywhere near Spain? A. By all means. You have got to go near Spain, within a few miles, to sight the light-houses.

Q. Before landing the cargo did you communicate at all with the shippers or consignees? A. On or about the same time, the same day on landing the cargo.

Q. Look at Claimant's Exhibit 1, Morgan, and say with whom you communicated in regard to the shipment covered by that bill of lading? (Said Exhibit 1 shown witness). A. With John Sofio & Co.—gave them notice; also to Messrs. Brown Brothers & Co., New York.

Claimant's counsel calls on counsel for Morgan to produce the notice sent to Sofio and to Brown Brothers & Co.

Mr. Burlingham: Before we go any further I should like to know what the defense is in the case.

Mr. Kirlin: The defense will be that the transportation of the cargo had become unlawful, and that the master was excused from bringing it forward by reason of the exemption of restraints of princes and rulers, and also had the right to land the cargo under the clause in the bill of lading, which says: "In case of "Blockade or interdict of the Port of Dis- "charge, or if, without such Blockade or in- "terdict, the Master shall consider it unsafe "for any reason to enter or discharge cargo "there, he is to have option of landing the "Goods at any other port which he may con- "sider safe, at Shipper's risk and expense, "and on the Goods being placed in charge of "any Mercantile Agent, or of British Consul, "and a letter being put into the Post office, "addressed to the Shipper and consignee, if "named, stating the landing and with whom "deposited, the Goods to be at the Shipper's

" risk and expense, and the Master and Owners
" discharged from all responsibility."

MR. BURLINGHAM: Those are all the defences, are they?

MR. KIRLIN: As at present advised; but I do not waive the right to any others that I may have.

Mr. Burlingham produces the notice to Sofio & Co., and states that he doesn't know anything about the notice to Brown Brothers & Co.—that he has not the notice given to them. 418

Q. (Said notice to Sofio & Co. shown witness). Is that the notice? A. That is my letter.

Said notice is offered in evidence and marked Claimant's Exhibit 6, Morgan, June 8, 1898.

Q. What communication, if any, did you have with the shippers or consignees under the bills of lading, Claimant's Exhibits 4 and 4a? A. To the Canadian Bank of Commerce, in New York, a letter, and also to I. & V. Florio, Palermo. 419

Q On what date did you send letters to them? A. The letters to these people—the same time.

Q. The 27th? A. The same time, the 27th—just as well as the others.

Claimant's counsel calls for the production of said letters. 420

MR. HILL: I don't know anything about letters to Messrs. Florio, but there is a letter to Spettabile, Canadian Bank of Commerce. (Counsel producing a letter).

Q. (Said letter shown witness). Is that your letter to the Canadian Bank of Commerce? A. Yes.

Said paper is offered in evidence, and marked Claimant's Exhibit 7, Malcomson, June 8, 1898.

Q. What was the substance of your letter to Florio?

421 Antonio G. Scopinich.

A. The same as these –similar to these. (Witness indicating said notices.) In fact, I wrote one, and then I copied the others.

Q. It was the same letter as this, only addressed to Florio? (Claimant's Exhibit 6 shown witness.) A. Yes.

Q. To whom did you send notices touching the cargo covered by Claimant's Exhibit 3? A. To Ferd. Baller,
422 Messina, and Hambro, New York.

Claimant's counsel calls for the production of said notices.

Mr. Reed: I have nothing from Hambro. I produce one sent to Baller. (Counsel producing a paper.)

Said notice offered in evidence, and marked Claimant's Exhibit 8, Baller, June 8, 1898.

Q. To whom did you send notices touching the
423 cargo covered by Claimant's Exhibit 2, Munroe? A. To Messrs. Munzoe & Co., New York. It was written "Munzoe A Co." in the bill of lading signed by the shippers, and I sent a letter accordingly.

Q. How did you address it? A. John Munzoe & Co., New York.

Q. And did you also communicate with the shippers? A. Yes.

Q. F. Amato & Co.? A. Yes, F. Amato & Co., Palermo.

424 Q. What was the form of that? A. The very same as the others.

Counsel Claimant's calls for the production of the notices touching the cargo covered by Claimant's Exhibit 2 Munroe?

(Mr. Regensburger having left the room, Mr. Hill stated that he had no authority from him to reply to the call.)

Q. Have you made a copy of the notices which have

425

been produced, and regarding which you have testified? A. Yes.

Q. Were they all in the same form? A. In the same form, yes.

Q. (Paper shown witness.) Is this a translation of the notices? A. Yes. That is as near as I can make it, being a foreigner.

Claimant's counsel offers said translation in evidence.

426

Marked Claimant's Exhibit 9, June 8, 1898.

Said Claimant's Exhibit 9 is as follows (said exhibit being headed "Copy of registered letter sent to shippers on breaking bulk"):

"Port Empedocle, 27th of April, 1898.

"On finding risky my passage to New York, "with the actual sulphur cargo, for facts of war, "I give you notice that I am discharging your "cargo for your own account and risk, under 427 "care of the mercantile agent, Mr. William "Peirce, depositing the same in the warehouses "of Mr. Zenobia Urso, and if these are not sufficient, in the warehouses of the British Consulate, faculty which I have in force in the "bills of lading.

"With my kindest regards, etc.,

"(Signed) Antonio G. Scopinich,

"Master Australian Steamer *Styria*."

428

(Copy of registered letter sent to consignees.)

"Port Empedocle, 27th of April, 1898.

"On finding risky my passage to New York, "with the actual sulphur cago, for facts of war, "I give you notice that I discharge the said "cargo under the care of the mercantile agent, "Mr. William Peirce, depositing the same in "the warehouses of Mr. Zenobia Urso here, and "if these are not sufficient, in the warehouses of

429 "the British Consulate, faculty which I have "in force in the bills of lading.

"With my kindest regards, etc.,

"(Signed) ANTONIO G. SCOPINICH,

"Master Austrian Steamer *Styria*."

Q. Did you also give notice to the Austrian Consul?

MR. BURLINGHAM: Objected to.

430 A. Yes.

Q. On the same day? A. Yes.

Q. (Paper shown witness.) Is that a copy of the notice to the Austrian Consul?

Objected to.

A. Yes.

Said copy of notice is offered in evidence, and marked Claimant's Exhibit 10, June 8, 1898.

431 Said Claimant's Exhibit 10 is as follows (being headed "Copy of letter sent to the Austrian Consul on the 27th of April, 1898"):

"Please take notice that by order of the repre-"sentative of my owners, for facts of war, I am "discharging the Austrian Steamer *Styria*, "commanded by me, at expense and risk of "whom it might concern, under care of the "mercantile agent, Mr. William Peirce, depos-"iting the sulphur shipped here, in the ware-

432 "houses of Mr. Zenobia Urso, and if these ware-"houses are not sufficient, in the warehouses of "the British Consulate.

"With my kindest regards, &c.,

"(Signed) Antonio G. Scopinich,

"Master Austrian Steamer *Styria*."

Q. Did you deliver this Claimant's Exhibit 10?

Objected to.

A. Yes.

433

Q. Did you also deliver a notice to the director general of customs?

Objected to as immaterial, irrelevant and incompetent.

A. Yes.

Q. This was to save duties on reshipment? A. Yes.

Q. Where was this delivered?

434

Objected to.

A. This was given through the Austrian Consul in Port Empedocle to the Customs—to the head official there of the Customs.

Said notice is offered in evidence, and marked Claimant's Exhibit 11, June 8, 1898.

Said Claimant's Exhibit 11 is as follows (said exhibit being headed "Copy of letter to the Honorable Director General of the Gabelle." (Customs):

435

"Having here loaded per the Austrian Steamer *Styria*, bound to New York, for account of the undersigned gentlemen:

"Messrs. Ignazio & Vincenzio
"Floria of Palermo, 1,000 tons sulphur
"Messrs. Ferd. Baller & Co., of Messina, 350 " "
"Messrs. John Sofio & Sons " 250 " "
"Messrs. Emil Fogg & Co., " 500 " "
"Messrs. F. Amato & Co., Palermo, 100 " " 436
"and sulphur being declared contraband of war, war
"actually existing between Spain and the United
"States of America, in behalf of the present laws, I
"deem it in the interest of all whom it might concern,
"to discharge the whole sulphur here on receiving the
"necessary permit from the Customs.

"As the duty of the master of a ship actually in com-
"mand of the above steamer, I humbly ask this Hon-
"orable Director to remit the duties for the above said
"quantities of sulphur on the set of reshipment, as

437 Antonio G. Scopinich.

"soon as peace shall be re-established between the two "beligerent nations, on the grounds that the duty, "according to the actual laws, was already paid the "first time."

Q. On what day did you begin to unload the brimstone? A. I began to unload the brimstone on the 27th of April.

Q. What did you do with it? A. We landed it into
438 lighters, and from lighters we conveyed it to shore in the warehouses of Zenobio Urso.

Q. Who selected this warehouse, and where was it? A. My agent.

Q. William Peirce & Co? A. Yes.

Q. Where is the warehouse? A. The warehouse is there in the landing on the beach in Port Empedocle.

Q. Is this one of the usual storage places in Port Empedocle? Yes.

Q. Did you make any rate by agreement in regard
439 to the charges? A. The usual rate that is customary there in the port.

Q. When did you complete the discharge? A. On the 7th of May.

Q. On the completion of the discharge did you communicate any further with the shippers? A. Yes. I sent them a letter—to both shippers and receivers—consignees I mean.

Q. Under each bill of lading? A. Under each bill of lading, to all shippers named in the bill of lading,
440 and to all the consignees named in the bill of lading.

Claimant's counsel calls for the production of said letters.

Mr. Burlingham produces a postal card, addressed to John Sofio & Co., dated May 7th, and signed by the captain.

Said postal card is offered in evidence, and marked Claimant's Exhibit 12, June 8, 1898.

Mr. Hill states that he has none.

Mr. Reed produces a postal card.

Said postal card is offered in evidence and marked Claimant's Exhibit 13, June 8, 1898.

Q. Were these postal cards all in the same form? A. The same form.

Q. Have you a translation of them? A. Yes.

Q. (Paper shown witness.) Is this it, and made by you? A. Yes.

Q. Is it correct? A. Yes.

442

Said translation is offered in evidence, and marked Claimant's Exhibit 14, June 8, 1898.

Said Claimant's Exhibit 14 is as follows (being headed "Copy of the registered postal cards sent to the shipper of sulphur"):

"EMPEDOCLE, 7th May, 1898.

"Referring to my letter of the 27th last., by
"which I gave you notice that the parcel of
"sulphur loaded by you on board the Austrian
"steamer *Styria* for New York, is laid at the 443
"risk and expense, in the warehouses of Mr.
"Zenobio URSO here, and as soon as you will
"pay the expense here made for your account,
"in conformity with the bills of lading,
"the said sulphur will be delivered to you."

Q. That is the form of the letter to the shippers? A. Yes.

Q. Have you a translation of the cards you sent to the consignees? A. Yes. 444

Q. (Paper shown witness.) Is this it? A. Yes.

Said paper offered in evidence, and marked Claimant's Exhibit 15, June 8, 1898.

Said Claimant's Exhibit 15 is as follows (being headed "Copy postal card sent to the receivers at New York—those that were named in the bills of lading"):

"7th May, 1898.

"Referring to mine of the 27th last, I give
"you notice that the parcels of sulphur loaded

445 "on the Austrian steamer *Styria* now lying in
"the warehouses of Messrs. Zenobio Urso here,
"at the risk and expense of whom it might
"concern.

"With my kindest regards, &c.,

"(Signed) ANTONIO G. SCOPINICH,
"Master Austrian Steamer *Styria*."

Q. Did you receive any communications on the sub
446 ject of the cargo from the shippers in Girgenti—with regard to landing the cargo? A. Yes. I received protests a couple of days after starting the discharge—two or three days after we commenced unloading, and on one occasion I received a telegraphic protest.

Q. From whom was that? A. From Emil Fogg & Sons, I believe.

Q. Have you those protests with you? A. I have the telegram on board.

Q. Have you the protests? A. No, I have not got
447 them. I handed them to the lawyer at Girgenti.

Q. Whose name you gave before? A. Yes.

Q. Did you reply to the protests? A. The lawyer did—in my name or in his name.

Q. The upshot of it was that you left all the sulphur at Port Empedocle? A. Yes.

Q. When did you leave Port Empedocle? A. I left Port Empedocle on the 8th of May, in the morning early.

Q. When did you arrive in New York? A. I went
448 to Messina on the 8th and sailed the same day. I shipped a few boxes of fruit and sailed to Palermo. On the 9th I was in Palermo, on the 17th in Algiers, on the 24th at St. Michael's, and I believe it was on the 3rd of June in the morning that I was here.

Q. What information did you act on in concluding; as you say you did, that this brimstone was contraband of war.

MR. BURLINGHAM: He has not said it was contraband of war.

449

MR. HILL: Objected to as immaterial, irrelevant and incompetent.

A. It was fully discussed in the papers over there.

Q. What papers?

Objected to.

A. Italian papers, the Sicilian papers, from Palermo.

MR. HILL: I move to strike out the answer.

450

Q. What was it that you saw?

Objected to.

A. (Witness continuing) And when we left it was not officially confirmed that sulphur was not contraband of war.

Q. That it was not? A. It was not officially confirmed that it was not contraband of war when we left.

451

MR. BURLINGHAM: I move to strike out the answer as irresponsive.

(Same motion made by counsel for the other libellants.)

Q. What were the discussions that preceded that?

Objected to as hearsay.

A. The discussion was that between Rome and Madrid they were trying to make arrangements so as to get sulphur declared free of contraband of war. I don't know how I can explain it better.

452

Q. And that was not agreed to, as far as newspapers reported, up to the time you left?

Objected to by counsel for all the libellants.

A. No, not officially. It was an understanding that the ships were to be let go free, you understand, but it was not officially confirmed.

Q. Do you know whether it was actually contraband or not?

Objected to.

A. I know that it is for to make gunpowder. Everybody knows that.

Q. Do you know whether the Spanish government considers or holds it to be contraband?

Objected to.

A. Of course it did hold it, because they were making understandings between Rome and Madrid about excluding sulphur from being contraband of war.

Q. You do not actually know what the outcome of that was yourself? A. No, I don't know. I read the papers. I could not be certain of it. But I was always under the impression that sulphur is to make gunpowder; it is wanted for that.

Mr. Burlingham: You must not tell us what your impressions were, captain.

Q. Are you bound on a voyage to sea from here? A. Yes.

Cross-Examination by Mr. Burlingham:

Q. The only reason why you put this sulphur out at Port Empedocle was that you had some fear of difficulties between Spain and the United States? A. The reasons that I put the cargo on shore—it was because it was to carry my instructions out.

Q. And who gave you those instructions? A. The managing owners.

Q. And who were they? Burrell? A. Burrell & Son.

Q. Then they knew what you were doing, did they? A. They knew that I was to carry out instructions.

Q. The fact that you intended to, and did, put this cargo of brimstone out of the ship was known to Bur-

457

rell & Son, was it? A. That I was landing the same?

Q. Yes. A. Of course it was.

Q. And you did it by their instructions? A. Of course.

Q. And the reasons you have given other than that reason are mere impressions of yours, are they? A. No. Only to carry out instructions, that is all. I did not act on my own judgment.

Q. Not at all? A. No.

458

Q. Then these statements that you have made to us about contraband of war, and negotiations between Spain and Italy, and war between the United States and Spain, are merely given us for information as to your feelings at the time, are they? A. Merely to carry out—not merely—to carry out the conditions of the bill of lading.

Q. What does that mean? A. That means that when the master thinks it unsafe to proceed, and so on. You may read it.

459

Q. Suppose you show it to me? (Bill of Lading shown witness.) A (Witness indicating). "In case of blockade." (Witness pointing out to this clause in the bill of lading.)

Q. (Counsel reading.) "In case of blockade or in-
"terdict of the Port of Discharge, or if, without such
"Blockade or interdict, the Master shall consider it un-
"safe for any reason, to enter or discharge cargo there,
"he is to have option of landing the Goods at any
"other port which he may consider safe, at Shipper's 460
"risk and expense, and on the Goods being placed in
"charge of any Mercantile Agent, or of British Con-
"sul, and a letter being put into the Post Office, ad-
"dressed to the Shipper and Consignee, if named, stat-
"ing the landing and with whom deposited, the
"Goods to be at the Shipper's risk and expense,
"and the Master and Owners discharged from all re-
"sponsibility." A. Yes.

Q. You think that under that clause of the bill of lading you had a right to put this sulphur out of the

ship at Port Empedocle, do you? A. When the war broke out.

Q. Your port of discharge was New York, was it? A. Yes.

Q. Did you think that New York was blockaded? A. Well, I wouldn't be sure about that, but I knew there was a war between Spain and this country.

Q. Did you ever hear of any blockade of New York?

462 A. No, I didn't hear about blockade, but I heard about the war, and I heard a blockade is going on, too—so it was talked, you understand; I don't know.

Q. Were there any other ships in this port that were loading sulphur? A. Not at the same time.

A. About the same time? Q. Not at the same time. Before, yes.

Q. Did you know whether the *City of Truro* sailed about that time? A. No. I have not seen the *City of Truro.*

463 Q. You know she did sail from the same port, don't you, with a cargo of brimstone? A. I was not aware of that.

Q. How about the steamship *Marty.* A. I don't know.

Q. How about the *Lord Warwick?* A. The *Lord Warwick* was alongside of us.

Q. Was alongside of you? A. Yes.

Q. And she was loading brimstone, was she? A. Yes—and she sailed before we did.

464 Q. When did she sail? A. I couldn't tell you.

Q. It was after war was declared? A. I couldn't tell you.

Q. Don't you remember that it was? A. I couldn't tell you.

Q. What time was war declared, if you know or remember? A. I couldn't tell you the dates.

Q. Was it on April 23rd? Don't you remember? A. I don't remember.

Q. How long had you been in Girgenti or Port Em-

pedocle when the *Lord Warwick* sailed—about how many days? A. I suppose three or four days.

Q A week? A. No; four or five days—something like that.

Q. She sailed to New York, didn't she? A. I couldn't tell you where she sailed.

Q. She sailed to America, didn't she? A. I couldn't tell you that. She sailed; but where I don't know. 466

Q. Do you say that Sofio & Co. protested against your landing this cargo? A. Yes.

Q. And in spite of their protest you landed it? A. Yes.

Q. Under this clause in the bill of lading? A. Yes.

Q. Under the power which you thought was given you in this? A. Yes.

Q. And by directions of your owners? A. Yes.

Q. Now, you say that you heard that sulphur—brimstone—was excluded from the list of contraband 467 articles? A. Not excluded exactly; but I heard negotiations were going on between Rome and Madrid about it to exclude it.

Q. When did you hear that? A. While we were finishing discharging.

Q. Don't you know that a proclamation was made by the Prefect of Messina about it? A. No.

Q. Don't you know that it was publicly announced in Sicily that an arrangement had been made between Spain and Italy whereby it was permitted to carry 468 brimstone? A. I have not heard that. I only——

Q. While you were there you got all the information you possibly could, didn't you, on the subject? A. Well, I heard people talking, you understand; but to what certainty they were talking I couldn't tell you.

Q. You seemed to have sent a notice to the Austrian Consul. Did you try to find out through him what these negotiations were between the Italian and Spanish governments? A. No.

469 Q. Did you make any effort to find out whether you could carry this sulphur or not? A. No.

Q. Did you get no information, nor try to get any information, about whether it was possible for you to carry it? A. No. Because I was reading the papers of what was constantly going on, you understand, and of course I didn't take any pains—I mean I didn't ask if sulphur was declared contraband of war, you un-

470 derstand.

Q. You said a little while ago, I believe, on your direct examination, that you thought that it was contraband of war? A. I thought it was contraband of war.

Q. Why? A. Because I had seen what the papers reported about sulphur.

Q. Do you mean to say that you did not inquire whether sulphur was contraband of war at all? A. If I did not inquire?

471 Q. Yes. A. But there was a talk in the town that sulphur was contraband of war.

Q. Did you make any inquiries of any people in authority as to whether sulphur was contraband or not? A. Not officially.

Q. You mean you heard gossip on the Exchange and in brokers' offices about it? A. Yes.

Q. And, for your part, as you knew that brimstone was used to make powder, you thought it must be contraband. Is that it? A. Of course.

472 Q. And that is about all there is to it? A. Yes.

Q. It was your own notion, that is all? A. Also I had seen it in the papers.

Q. Do you believe everything you read in the papers, captain? A. I don't know if I should believe; but I know the papers were talking frequently about this brimstone being or not being declared contraband of war, you understand.

Q. And there was a great desire on the part of the Italian government—— A. (interrupting) To have it free.

Q. That it should be free? Yes.

Q. And that it should not be regarded by Spain as contraband? A. Yes—and that put me in the path that sulphur is contraband of war.

Q. That suggested it to you, you mean? A. Yes.

Q. That it must be contraband? A. Of course—as Italy was continually exchanging words with Madrid about this sulphur to let it go free.

Q. Now, as matter of fact, captain, don't you know 474
that on the 5th of May, before you sailed, the Italian government had received a message ftom the Spanish government, which was made public throughout the whole of Italy, that sulphur would not be regarded as contraband of war by the Spanish government? A. I have not seen that.

Q. Was there not one of the 2nd? A. I don't know.

Q. Did you try to find out whether——A. (interrupting) I was so busy going to Girgenti, going to the law- 475
yers, and so busy corresponding with the owners, I didn't have time to think of it.

Q. The fact was that after your owners told you to do it you gave yourself no more thought about it? Is that it? A. I was to carry out their instructions.

Q. After you had put the sulphur out you took in some other cargo, I suppose? A. Not in Girgenti.

Q. In any other place? A. Yes. Palermo and Messina.

Q. Did you get any instructions from Burrell & Sons 476
to go forward to New York. A. Yes, to load fruit.

Q. You got a better freight by taking this green fruit, didn't you? A. I don't know.

Q. You know what the freight was? A. The freight on fruit ranges about the same all the year round.

Q. Isn't it a fact that the freight——A. (continuing) In fact; last year it paid more than this year.

Q. What was your freight on this fruit? A. Eight or ten pence per box.

Q. Ten? A. Eight or ten.

Q. How much was the gross freight from Italy to New York? A. About £1,600.

Q. And what would have been the gross freight on the sulpur? A. Oh, sulphur alone we could never take.

Q. Your cargo with the sulphur in was about £1,400 Sterling? A. I did not reckon it up.

Q. Reckon it up now? A. I couldn't tell you. I
478 couldn't reckon it, because I never know what is coming on board ship.

Q. (Paper shown witness.) Look at the paper I show you and see whether that estimate is anywhere near correct. A. It is not for me to say, because sometimes we leave holds empty, you understand.

Q. But you had so much sulphur, hadn't you? A. Yes.

Q. You had about 2,200 tons of brimstone on board? A. Yes.

479 Q. And the freight was six shillings per ton? A. Yes. But there was any amount of space, you understand, for fruit.

Q. And if you had filled it up with boxes of fruit—— A. (Interrupting) I think the freight would be nearly about the same. Because sulphur would not occupy much space; in fact, it would stiffen the vessel, you understand. I left cargo behind, the vessel not being stiff enough; so I could never have earned the freight that they would have made by having the brimstone
480 in. I believe the freight would be about the same, according to my practical experience.

Q. Then you did not lose a cent by this putting the brimstone out? A. And getting the other freight?

Q. Yes. A. I don't think so.

Q. You made money by it? A. I don't think we made or lost by the thing.

Q. How many boxes of fruit did you bring? A About 40,000.

Q. 40,000? A. Boxes and half boxes.

Q. How much could you have brought if you had

carried the sulphur? A. If we had carried the sulphur?

Q. About 22,000? A. Oh, more than that

Q. How much? A. I think she would have taken about 30,000 at least. Because there was any amount of space left, because we could not load here full up on account of the ship being cranky, you see.

Q. What ballast did you have? A. I was obliged to stop loading and take in ballast—stone ballast and 482
sand ballast—and cause the owners expense.

By Mr. Reed:

Q. Isn't that because you have to have a certain amount of ballast for fruit? A. No.

Q. Usually you have to have? A. I usually have enough—plenty—of ballast. We put it in the place where we could not put freight, and that caused the owners extra expense.

Q. Did you bring suits over in Italy against these 483
shippers of cargo for the expenses of putting the cargo out? A. Suits?

Q. Lawsuits? A. I don't know what was going on since I left. But when I left I only told them that the cargo was to be landed at their own risk and expense.

Q. You did not authorize a lawyer to bring an action against John Sofio & Co. for those expenses, did you? A. Yes, I left him the power of attorney.

Q. Directing him or empowering him to bring a suit? A. To answer all the questions, and in the case 484
of suit to represent me in every case; if necessary, to bring suits against the people.

Q. What claim did you make against Sofio & Co? A. The claim for expenses of landing the goods and storing them.

Q. Under this blockade clause in the bill of lading? A. Yes.

Q. That is the only basis for it? A. Yes.

Q. Was the brimstone weighed over there? A. Yes, under the supervision of a customs officer—of the Custom House officials.

485 Q. And are these cantars measures of weight? A. Yes.

Q. How many cantars were there in Sofio's shipment? A. I couldn't tell you, because I don't know the weights.

Q. Isn't it correctly stated in the bill of lading? A. I don't know, because I never supervise the weighing, and always sign weight unknown, as you see in the bill
486 of lading.

Q. Was it in good order? A. It might have been in good order.

Q. You gave a clean receipt for it? A. Oh, yes, and a clean bill of lading too.

By Mr. Hill:

Q. When do you say you arrived at Port Empedoc'e? A. On the 21st.

Q. You say you don't know anything about the *City*
487 *of Truro?* A. No.

Q. Wasn't she there when you arrived? A. No.

Q. Didn't she sail on the 24th? A. No. I have not seen her, as far as my memory is concerned. The *Lord Warwick*, yes; but the *City of Truro*, no.

Q. And how about the brimstone in these bills of lading exhibit 4, Malcomson and exhibit 4a Malcomson? That was weighed by the Custom House, or weighed under their supervision? A. On ship and on land; both ways.

488 Q. Was the full amount mentioned in those bills of lading landed? We had a certificate from the customs to state what was landed.

Q. And did you land the full amount stated in those bills of lading? A. Everything. There was not a pound left on board the ship.

Q. And it was the full amount mentioned in the bills of lading? A. I could not tell you whether it was agreeable with the bill of lading quantity. I hadn't time enough to check that.

Q. Was that brimstone in good order when you landed it? A. I hope so.

Q. You have an opinion about it, haven't you? You saw it, didn't you? A. I am not a brimstone merchant, and I don't understand whether brimstone is in good order or bad order. You want a few years experience to understand that. That was the first time, you see, that I have loaded it.

MR. KIRLIN: On the call of the counsel for Morgan, the log is produced and marked for identification.

Log is marked Morgan Exhibit A for ident., June 8, 1898.

By Mr. Kirlin:

Q. What language is it in? A. Italian.

By Mr. Burlingham:

Q. It is kept by the chief officer, is it not? A. By the second officer.

Q. Is the second officer on board? A. Yes.

Q. And the chief officer? A. Yes.

Q. And they were both on board at the time in Girgenti? A. Yes.

By Mr. Hill:

Q. Now, captain, you say that you put this brimstone ashore on instructions of the managing owners? A. Yes, and also because I knew that the war was there, and I acted on the bill of lading clause.

Q. You have testified, haven't you, that all this you did by orders? A. No. The principal reason was because I was ordered; and, secondly, that I had the bill of lading clause that fully authorized me when I deem it not safe to proceed with the cargo that was declared contraband of war.

Q. Do you want to change your testimony in that respect? A. No, I do not.

Q. Because you testified before that you were obeying orders. A. I said I acted on the owners' instructions, and also on the bill of lading clause.

Q. Won't you tell us what reason you had, other

than the fact that there was a war, to consider it unsafe to enter, or attempt to enter, the port of New York? What other reason did you have besides? A. The reason that I had was that I was passing close to Spain, and a man-of-war might stop me on my way.

Q. You didn't know anything about it except there was war? A. Yes.

Q. That is all? A. And then there was also in the
494 newspapers, the Italian newspapers, that a man-of-war was there looking for ships.

By Mr. Kirlin:

Q. Where? A. Off the coast of Spain. In the Italian newspapers.

By Mr. Hill:

Q. Did you inquire about that? A. I did not inquire, because I seen it in the newspapers, and I believed it more than any of the other inquiries.

495 Q. You did not inquire of any officials? A. No.

Q. How did you get these instructions from your owners? A. Because no official would give you any information, while he will give you it in writing, and he would rather not give it. That is why.

Q. I didn't ask you that, but never mind. How did you get these instructions from the owners? A. Telegraphic instructions; also, to my agent in Sicily.

Q. Had you asked for instructions? A. No.

Q. Didn't you suggest to them that they had better
496 instruct you? A. I beg your pardon.

Q. Didn't you suggest to them that they should tell you to do it? A. I didn't suggest to them. We are not supposed to know about that. They always handle the ship, you know.

Q. You heard negotiations were going on, you say, to exclude sulphur from the list of articles that were contraband of war. A. And that proved, of course, that sulphur is contraband of war.

Mr. Hill: I move to strike that out.

Q. And you heard it rumored that the endeavors in that way had been successful, and that it was not to be declared contraband? A. Endeavors in what?

Q. To have it excluded from the list of contraband articles? A. There was a rumor that they would exclude sulphur.

Q. There was that rumor? A. Yes, there was a rumor.

Q. When did you hear that rumor? A. When I 498
had about finished the job.

Q. Did you take any pains to verify that? A. Well, I looked at the papers.

Q. I know, but did you make any other inquiry? A. I spoke with the Austrian Consul several times.

Q. Upon that subject. A. On this subject. But I could never find out anything.'

Q. Did you inquire of him whether the Spanish Government had agreed that sulphur should not be contraband—did you ask him that? A. Yes, about 499
the end.

Q. You asked him that? A. Yes.

Q. And what did he tell you? A. He had no official communications.

Q. But the papers published that it was not to be contraband? A. The papers published that negotiations were going on.

Q. The papers published before you got away from there that they had succeeded, didn't they? A. Not that they had succeeded; that sulphur will be let 500
go free, you understand, but not officially confirmed.

Q. No; but the papers published that? A. Yes.

Q You had the same knowledge of that that you had of warships being waiting for you and things of that sort; you had the same information on both sides of the question, hadn't you? A. Yes

Q. You had just as much reason to believe that sulphur was not to be contraband as you had to believe that there were warships waiting to seize you? A. I

501 Antonio G. Scopinich.

had seen in the papers that a Spanish man-of-war caught a ship loaded with brimstone.

Q. You had the same sources of information on both subjects? A. Yes.

Q. The newspapers both times? A. Not at the same time.

Q. Not the same time; both times; and you made no attempt to verify any of them, except this inqniry
502 of the Consul? A. Yes.

Q. If you had not been instructed by the owners, would you not have waited to verify that before you discharged? A. Before I was instructed by the owners to sail with the sulphur I would have done so.

Q. And if they had not instructed you at all you would have waited to find out, wouldn't you, before you would have discharged the cargo? A. I don't know if I would; I couldn't tell you now what I would
503 have thought over there.

Q. You could not tell what you would have done? A. No. It greatly depends how a man finds himself. Probably he would do a thing to-day and to-morrow he would not do it.

Q. And you cannot carry yourself back so as to say what you would have done if you had not had instructions? A. No; I can't tell you now what I would have done then.

Q. In discharging into the warehouse did you ar-
504 range that different consignments should be kept separately? A. Of course. And it was separated, because I have seen it myself.

Q. You have seen it yourself? A. Yes.

Q. In whose charge did you leave this? A. Zenobio Urso; and there was put a lien on the goods for expenses.

Q. You put a lien on the goods for expenses. A. Yes; and the lawyers and the Sheriff, they examined all the lots. They were there.

Q. How much was the lien on these goods that you

received from Emil Fogg & Sons and from Florio? A. I couldn't tell you.

Q. You don't know that? A. No; I don't remember.

Q. Did you receive protests from Fogg and Florio? A. Yes, two or three days after I commenced discharging.

Q. A protest against your discharging? A. Yes; I had three or four protests; I don't know the names 506 now.

Q. They all protested, didn't they? A. I don't remember whether they all protested.

Q. Can't you recall whether Emil Fogg protested? A. Yes.

Q. And can't you recall whether Florio protested? A. Yes.

Q. After you got your orders from your owners you simply discharged, and bothered yourself no further about it—just carried out your orders? A. I dis- 507 charged everything, of course, as fast as I could, and took all necessary precautions so that none of the sulphur got spilled, so as to deliver the quantity shipped.

Q. You didn't bother yourself any further about the question of whether you should discharge or sail, when you got your orders; you followed your orders out? A. What do you mean?

Q. You did not bother yourself? A. To find out what? 508

Q. You did not bother yourself to consider the question any further whether you should sail or not, after you got your orders? A. No. Because you are dependent on orders.

Q. When you got your orders you acted on the orders? A. Yes. I was dependent upon orders. On starting discharging, it was my place to sail as quick as possible—according to instructions.

Q. Sulphur, you say, is not a very profitable cargo to carry?

Mr. Kirlin: He did not say that.

A. That I don't know. I didn't say that.

Q. You said you couldn't possibly make the thing pay if you carried only sulphur? A. Sulphur, no, because we were engaged to carry also fruit. We would also always fill the ship with goods.

Q. You said it wouldn't pay to carry sulphur alone? A. It wouldn't pay to go to America with sulphur alone.

510 Q. So sulphur is not a very profitable cargo by itself? A. I don't know that. Of course, I look at it this way: That ship carries 4,000 tons; and if we only sailed with 2,000 tons, of course, it wouldn't pay the owners —the coal neither, the burning.

Q. This was pretty low freight for sulphur? A. It is the customary freight.

Q. Hasn't the freight usually been higher than that? A. I don't know.

Q. Hasn't the freight since that time doubled? A.

511 I don't know. I am not aware of that. I know freight on fruit didn't go above the usual rate.

Q And you don't know what the freight on sulphur was? A. No.

Q. I am requested by Mr. Regensburger to ask you a question on his behalf. Did Munroe & Co., on Saturday last, the 4th, tender you the freight and demand their goods? A. They might have done so at my agent's office; not to me.

Q. Not to you? A. No. On Saturday I know they

512 were at the agents', because the agents were telling me they had men in there looking about the sulphur or taking particulars—I know that.

By Mr. Reed:

Q. You had no communication with Ferdinand Baller & Co. notifying them about discharging sulphur prior to this notice, Claimant's Exhibit 8 Baller? A. No.

Q. This letter was the first communication you gave them of your discharging the sulphur? A. Yes.

513 Q. Now, when you heard those rumors about sulphur being allowed to pass, you say that you communicated with the Austrian Consul. Was he the only official that you——— A. (interrupting) No. I used to frequently see him and talk with him, you understand, and of course he didn't know—he couldn't give me any information on the subject—positive information.

514 Q. Did you communicate with Ferdinand Baller & Co. on that question? A. No.

Q. Did you communicate with any of the shippers? A. There was a clerk of them, you understand; we used to see each other every day in the office; but Ferdinand Baller I have not seen.

Q. Did you communicate with any of the shippers of the sulphur as to the action of the Spanish government? A. No, with none of them.

515 Q. Messrs. Baller & Co. also protested, did they not, on the subject—against your discharging? A. Yes. I believe so, you know. Because I handed the protest to the lawyer and didn't take any particulars.

Q. You also took a proceeding, did you not, against the sulphur shipped, or have some legal proceeding? A. I told the lawyer to answer to all questions. I don't know whether he has done it or not. He promised to do it when I sailed, but I don't know.

516 Q. When was it you began to discharge the sulphur? A. On the 27th, the very same day. We would have done it on the 26th, but bad weather prevented us from doing so.

Q. And you finished on what day? A. 7th of May.

Q. And you sailed on what day? A. On the 8th, in the morning.

Q. Then the postal card which you wrote to Baller & Co. (Exhibit 13), was written on the day that you finished discharging? A. Yes.

Q. Where did you go from Girgenti? A. To Messina.

Q. And there you loaded with fruit? A. Yes.

517 Q. Green fruit? A. Only fruit.

Q. Only fruit? A. Only fruit.

Q. Had you arranged to ship fruit there before you left Girgenti? A. It was arranged before we arrived in Girgenti.

Q. You took a full cargo of fruit, I understand? A. No, I couldn't take it, because I had to take ballast, because I discharged the sulphur, and I had to leave
518 goods behind.

Q. Tell me how many boxes of fruit can you carry? A. Boxes and half boxes, she would have carried 45,000—about.

Q. How many did you have? About 38,000 boxes? A. About 40,000, between boxes and half boxes—about.

Q. And your gross freight you testified was 1,600 pounds? A. Thereabouts.

Q. How many tons of brimstone were there?
519 About 2,200? A. About 2,200.

Q. And that made room for how many boxes? A. I couldn't tell you exactly, because I don't know what cubic space would take a ton of sulphur.

Q. Wouldn't about 18,000 boxes go there? A. I couldn't tell you that.

By Mr. Kirlin:

Q. You were intending to fill up with fruit, were you? A. Yes. The cargo was engaged; but I knew that only when I got to Palermo.
520

By Mr. Reed:

Q. You had instructions, however, to clear out at Girgenti and stop at Palermo? A. And proceed to Messina and Palermo.

By Mr. Hill:

Q. Captain, didn't you receive a protest against discharging from James L. Morgan & Co.? A. I received a protest from the shippers over there in the name of some of the consignees in New York; and I believe it wae Malcomson.

521

Q. Morgan? A. I don't know. A firm in New York. I couldn't be certain whether it was Morgan or not.

Q. The shippers were Sofio & Co.? A. I don't know. They said they acted in behalf of people in New York.

Q. Don't you recall whether it was John Sofio & Co.? A. I couldn't tell you, because I transferred that to the lawyer over there.

522

By Mr. Reed:

Q. Where is Licata? A. Licata is a few miles from Girgenti.

Q. Do you know whether the *City of Truro* loaded there when you were there? A. No, I don't know about that. We don't 'get communication there like we would get it here with the "Herald," you know.

Q. Do you know the steamship *Europa?* A. No.

523

Q. Do you know she sailed from either Licata or Girgenti on the 30th of April with 2,500 tons? A. She might have sailed, but I don't know.

By Mr. Hill:

Q. You did hear, didn't you, that vessels were sailing with sulphur? A. I didn't hear anything there. It is a small place; you don't get news. I seen in the papers that one had been captured; whether it was the truth I don't know.

524

By Mr. Reed:

Q. You had nothing but sulphur shipped at Girgenti? A. Nothing else but sulphur; and from Trieste we had a portion on board.

Q. Not much? A. A couple of hundred tons.

Q. Now, the shipment of sulphur and your sailing with a load of sulphur was the most important thing you had to think of at Girgenti, was it? A. The body of the cargo?

Q. Yes. A. 2,200 tons we would call half of the cargo.

525 By Mr. Hill:

Q. Half a load? A. Half a load.

By Mr. Reed:

Q. It was a matter of great importance whether you should turn it out or not? A. I don't know whether it was a matter of importance. One cargo or another is the same thing, as long as you earn the freight.

526 Q. Was it not a matter of importance to think about at that time? A. To think of what?

Q. Whether you should carry that sulphur, or leave it there? A. The matter of importance for me was to think then if it would be best to put it ashore instead of carrying it, to be sale in the navigation.

Q. But you made no other inquiries than those you have mentioned? A. About what?

Q. No other inquiries about whether you should carry the sulphur or not than the inquiries you have mentioned? A. No; because all the inquiries I could have made there, you understand, I don't know how much faith I could have placed in them, and I supposed the owners were looking on the other side. Officially we could get nothing.

527

Re-Direct by Mr. Kirlin:

Q. You say you were in communication with the Austrian Consul almost daily? A. Not daily, but almost every day.

528

Q. And he, you say, had no official information on the subject up to the time you sailed? A. No, he had not up to the time I was working the cargo in.

Q. When did you see him last? A. I saw him last when I was clearing the ship.

Q. Had he any information then?

Objected to.

A. No, not so far as I know.

By Mr. Hill:

Q. Did you ask him? A. No, I didn't ask him. But the Consul over there is supposed to give you a notice.

By Mr. Kirlin:

Q. You say the matter was discussed between you? A. We talked about—about this war question and one thing and another, you know.

Q. Your agent there, you said, was Mr. William 530
Peirce? A. Yes.

Q. He was an English speaking man, was he not? A. No, he speaks only a little English, although he is from English parents.

Q. Did he know anything definite about this?

Objected to.

Q. So far as your communications with him tended to show?

531

Objected to as calling for a conclusion.

A. I don't know.

Q. He was your agent? A. Yes.

Q. Did you discuss the matter with him? A. As to what?

Q. As to whether this was contraband or not? A. Well, of course, we talked the matter over several times, you know.

Q. Did he know anything about it? Did he know, 532
or did you learn from him? A. Yes. Hold on! The day when I sailed I saw a notice from the Consul—yes, I remember now—a notice from the Consul to say that sulphur—that there was a communication from the prefect that it was agreed between the two powers that sulphur will not be ——

By Mr. Reed:

Q. Taken? A. Taken; but officially it was not confirmed.

By Mr. Hill:

Q. The prefect is official? A. No; but officially from Spain to Italy—it was not given officially—only a matter of a verbal arrangement. Of course, the verbal arrangement you can't believe.

By Mr. Kirlin:

Q. If I understand your testimony, the statement of the prefect was that it was not confirmed, that it
534 was to be free? A. It was verbally spoken that it is free, and that the Spanish ships had instructions to let it go free; but not officially—they could not let it go officially.

Q. That is, they would not give it officially to Italy? A. To Italy, no.

Q. That was the information that the prefect gave you? A. Yes—when I was clearing the ship.

By Mr. Reed:

535 Q. What do you mean by when you were clearing the ship? The day you sailed? A. On the 7th, in the evening, about eight o'clock, and I had already my clearances.

By Mr. Kirlin:

Q. In the notices that you sent to the shippers, the translation of which is embodied in Claimant's Exhibit 9, you said that you had left the cargo under the care of the mercantile agent, Mr. William Peirce. A.
536 Yes.

Q. What did that mean? A. Because it was stated on the bills of lading that the cargo to be landed—Just repeat the question.

Q. Left in the care of the mercantile agent. Did you leave it to the care of Mr. Peirce? A. I left it in the care of Zenobio Urso also, because afterwards, when the lawyers came down, they said it is to be given in the care of the man that has got it in the warehouse.

Q. Is he the mercantile agent—Zenobio Urso? A.

He is the warehouse keeper; of course in the mercantile business.

Q. Did you, as a matter of fact, consider it safe to bring brimstone?

Objected to as immaterial, irrelevant and incompetent.

A. No, I did not think it safe. When you see in the papers the ships are stopped with sulphur you 538 would not call it safe.

Mr. Hill: Objected to.

Re-Cross by Mr. Hill:

Q. (Paper shown witness.) Is that paper the substance of the statement by the prefect to which you just referred as to the arrangement between the Italian and Spanish governments? A. Yes, the substance—no, that was a paper that was sent by the Consul to 539 my agent.

Said paper is offered in evidence and marked Libellant's Exhibit B, June 8, 1898.

Mr. Kirlin: Objected to on the ground that this is not the paper that the captain says he saw, nor the notice, the paper referred to by him being a notice from the Consul to his agent.

By Mr. Kirlin:

Q. (Paper shown witness.) Is that paper a translation of it? A. This is the 18th of May—yes. There 540 was a notice given to the agent by the Austrian Consul, but none to me.

By Mr. Hill:

Q. The Austrian Consul gave a notice to the agent? A. Yes.

Q. Substantially to that effect? A. On those terms, yes.

541 Q. Given to the agent, but not given to you? A. No.

Q. But you knew it was given to the agent? A. I heard them read it. The vessel was clearing then, but the cargo at the same time was landed.

By Mr. Reed:

Q. Captain, did you receive a protest of which that is either the original or a copy? (Paper shown wit-
542 ness.) A. I believe I received one of these. I don't remember the name, if it was Baller, but one of them I received.

Mr. Reed offers said paper in evidence.

Objected to on the ground that that particular document has not been proved to have been delivered to the captain.

Marked Libellant's Exhibit C, June 8, 1898. (Printed as *Styria's* Exhibit F5, sub. p. .)

543 Re-Re-Direct by Mr. Kirlin:

Q. (Paper shown witness.) Is this document following it the answer that you made to that protest? A. The lawyer did, not me.

Q. That is it? A. Yes.

Q. What is the date of this? A. 11th of May.

Q. And by whom was it signed? A. It was sent from my lawyer in my name to Ferdinand Baller & Co.

544 Said paper is marked Claimant's Exhibit 16, June 8, 1898. (Printed as *Styria's* Exhibit F6, Feb. 14, 1899, p. .)

Q. What is your nationality, captain? A. Austrian.

Q. What is your native language? A. Well, we speak Italian in the seaports.

Q. What is your best tongue? A. Italian. That is the only language I can speak well, though I speak three or more. I can speak German, French, Spanish, and Slavonic, too—along with my business, not

545

fluently; I believe English is the best I can speak, and French.

Q. Next to the Italian? A. Yes. I can speak right enough with commercial people; but with lawyers you have got to be very careful! They make you think too much!

546

Deposition of ANTONIO G. SCOPINICH, recalled for further direct examination, taken on behalf of claimant, pursuant to notice, before James T. Kilbreth, Notary Public, at No. 5 Beekman street, New York, October 18th, 1898.

ANTONIO G. SCOPINICH, recalled for further direct examination, testifies as follows:

DIRECT EXAMINATION by Mr. Kirlin:

547 Q. Captain Scopinich, on your previous examination, pages 60 and 61, in two of the questions put by me, the word "prefect" was used in connection with an inquiry as to what you had heard when clearing the ship with regard to an alleged understanding between the Spanish and Italian Governments that sulphur would not be treated as contraband of war, notwithstanding the royal proclamation; and in answer to one of the questions you assented to the suggestion that you had received information from the prefect. Do you desire to make any correction in regard to that? 548 A. Well, it must be a mistake there, because I never saw the prefect, or saw any document from him. Only the paper I saw the Austrian Consul handed to my agent. So I repeat that it must be a mistake there.

Q. Who was it that told you what you testified you heard about this understanding as you were clearing the ship? A. The agent was talking the matter over to me.

Q. What was the name of the agent? A. Mr. Peirce.

Q. William Peirce? A. Yes; and at the same

549 time he handed to me the Consul's statement—not of the prefect's.

Q. The Consul's statement? A. The Consul's statement—to read it. That was the 7th of May, about 8 or 8:30 P. M.

Q. Prior to that had you any information of any understanding between the governments on that subject? A. No. But the newspapers I was reading
550 daily, you know; I saw in the newspapers that there were negotiations going on.

Q. But of the result of the negotiations? A. As I said in my statement before, that, of course, sulphur would be let go free, but not officially confirmed, you understand. Of course that meant that temporarily they would let it go free—temporarily, you understand. That was the way it was stated in the newspapers.

Q. And this information that you got from William Peirce was accompanied, you say, by some paper from
551 the Austrian Consul to Peirce? A: To Peirce, yes.

Q. That was the first that you knew about the matter officially, was it? A. Yes.

Q. Captain, have you got with you a list of the expenses you paid in Girgenti for discharging and land ing and storing this cargo? A. Yes.

Q. (Paper shown witness). Is that it? A. Yes, that is it.

Q. That is the list of charges paid by you, is it? A. Paid by me.

552 Said list is marked Claimant's Exhibit 17 for Ident. Oct. 18, 1898.

Translation of same marked Claimant's Exhibit 17a for Ident., Oct. 18, 1898.

(By consent the translation is attached to the minutes.)

Q. The first item there, captain, of Lire 6,984.88 refers to the expense of discharging under sail. What does that mean, "under sail"? A. That is, the

lighters would come alongside and fetch the sulphur away.

Q. What does "under sail" mean? A. It is because they generally sail to the place.

Q. Sail lighters? A. Yes.

Q. Does that include the pay of the men on the lighters? A. Yes.

Q. That was a lighterage charge? A. Yes; to convey the sulphur ashore. 554

Q. You paid that? A. Yes.

Q. Was that a fair and reasonable charge? A. That is the usual charge of the place, as far as I got information—as far as my information is concerned that I got from the people in the town; because I was looking after the people in the town to see whether I was paying right or wrong.

Q. The next item seems to be for weighers' charges on delivery of sulphur ashore? A. Yes.

Q. Did you have it weighed out? A. Yes, weighed 555 out on shore, not aboard the ship.

Q. Weighed on the lighters? A. On shore. We used to keep the scales on shore and weigh it there—from the lighter into the scales.

Q. That charge of Lire 279.39 was paid also? A. Yes.

Q. Was that a reasonable charge? A. Yes.

Q. The next charge is for delivery clerk, Lire 90.00. What was his function? A. To avoid any mistake of the parties of each other—to deliver to each lighter— 556 to the party, you understand—the same quantity.

Q. Keeping the parcels separate? A. Separate. Yes. It was for that.

Q. Was that a usual charge? A. The usual charge.

Q. The usual rate, I mean? A. Yes.

Q. What was the payment to Custom officials for overtime? A. Lire 59.00. Because we would work later at night. Lire 59.00 for overtime.

Q. Did you have any expense for unloading-rope? A. Yes, I had a big coil of rope.

557 Q. New rope? A. New rope; brand new. We always have to have new ropes. The ropes that have been used for loading are no longer good for discharging.

Q. How often have you to get ropes for discharging cargo? Every voyage.

Q. Every discharge? A, Every discharge.

Q. Did you actually get new ropes for the landing
558 of this sulphur? A. Yes.

Q. Is that the cost of them? A. That is the cost of them. But our other loader at Trieste supplies us with ropes for the voyage, and this rope was intended for the discharge of sulphur in New York.

Q. In New York? A. Yes.

Q. But you used it there? A. But we used it there to discharge it there instead of New York.

Q. This is the cost of the rope, Lire 1,238.88? A. Yes.

559 Q. Did you keep an account of the coal consumed in running the winches? A. Yes. We kept a due account of the coal consumed for the winches. The winches were going, and our donkey boiler was not powerful enough to keep them going, so we had to use the main boiler, and that is how we had to consume a little more coals than we would have consumed by using the donkey boiler; but the work would have been retarded considerably.

Q. At what rate did you charge for the coal. A.
560 The usual market price

Q. There? A. Yes.

Q. And how much did that amount to? A. It amounted to Lire 1,440.00.

Q. When you went into Girgenti to load this sulphur had you any ballast aboard? A. When I came to Girgenti?

Q. Yes. A. No. Well, I had about ten tons, no more.

Q. Where had you discharged your ballast? A. At sea, the most part of it. and the----

Q. Whereabouts at sea? A. (Continuing) and the sweepings, say about ten tons, were put into the lighters there on arrival.

Q. And where had you discharged it? Whereabouts? A. On approaching Girgenti. I did not think it safe to discharge it before, because bad weather might have come on, you see.

Q. Have you any water-ballast tanks? A. None.

Q. Now, when you took the sulphur out, was it safe to proceed on your voyage without any ballast? A. No.

Q. You shipped ballast, then, did you? A. Yes.

Q. How much? A. I shipped about a hundred and odd tons—103.

Q. What was the cost of it? A. It cost about 206 lire.

Q. What were the stevedore's charges for unloading the sulphur? A. Lire 1.10 per ton. That came to 2,365 lire.

Q. What investigation did you make as to the proper charge for stevedoring? A. Well, the proper charge for stevedoring is about one lire for discharging coals; that is, a lire on 1,000 kilogrammes. That is the way. I asked the coal merchant what the master pays generally for discharging, and that is the information I had from him to guide myself by. Because there was not a case where a ship had been discharging sulphur in Port Empedocle, and so I could not get information in that line.

Q. Coal was nearest, was it? A. Yes.

Q. Nearest light cargo? A. Yes; yes, for a full cargo, you understand, or part of a cargo, that has been discharged there.

Q. Is that substantially the same rate? A. Here is a little more, perhaps; about ten cents more; but you have got to look at the nature of the cargo, which spoils the eyes of the people, and they always expect more for discharging sulphur.

Q. What is the charge for loading sulphur there?

565 A. I could not tell. Because Mr. Burrell has got a contract with Florio.

Q. You also consulted with your agent about this discharge? A. Oh, yes, decidedly; and I strongly recommended him to get the rate down as much as possible.

Q. What is your judgment as to the fairness of that charge—the rate of it? A. The rate of discharging?

566 Q. Yes. A. I think it is a fair discharging rate.

A. How many days did you have men working at the winch unloading sulphur? A. Thirty-nine days.

Q. What is the rate? A. At lire 2.50 per day; total lire 97.50.

Q. You have an item in your bill, "carriage hire for Girgenti." What was that for? A. Carriage hire to Girgenti. That was because I went to the lawyer for the ship's business; in fact, for this affair of the sulphur. Eighteen lire.

567 Q. Putting a lien on it? A. No, not then; before that. To acquire information from him. And besides these, I had some that I did not put in this bill. I used to pay them, you understand, as I was making them, and never kept a record, you see.

Q. What did you use for lifting the sulphur out of the hold and conveying it down into the lighters? A. I used tubs.

Q. Where did you get those tubs? A. I got those in Girgenti.

568 Q. Did you buy them? A. Yes.

Q. What did you pay for them? A. I bought them as I could get them from a man that had a few barrels.

Q. You bought barrels? A. Yes.

Q. And made them into tubs: A. Yes. Just petroleum barrels; and I cut them in two and made them into tubs.

Q. How many barrels did you buy for this purpose? A. We bought twenty.

Q. How much did you pay for them? A. Eighty-two lire for the twenty. I had a carpenter to fix

those barrels while we were working, six days—fixing those barrels as we were unloading over the side—cutting them up.

Q. How much did you pay the carpenter? A. Six days, at five lire per day.

Q, Thirty lire? A. Thirty lire.

Q. What were your port charges? A. The port charges were lire 167.90.

Q. What were those for? A. I suppose broker's 570
charges, agency and consular fees. Pilotage. I couldn't recollect if there is a separate voucher for that.

Q. Would pilotage be covered by as small an amount as that? A. I think so. The pilotage is only a small expense—50 odd lire as a rule. I don't know, I couldn't be sure, if the pilotage is included in this; but there must be a detailed account there.

Q. What would this amount to if it was there? A. The pilotage would be about 50 odd lire.

Q The cash to the captain and the damage to the 571
lighter had no connection with this matter? A. They had no connection with it.

Q. Telegrams, lire 161.10. What was that for? A. This was to communicate with the lawyers, to communicate also with the shippers and receivers, and also with Mr. Florio, the general agent for the ports of Sicily.

Q. Were those in connection with this re landing of the sulphur? A. Yes. Because my own telegrams that I exchanged with the owners I kept the vouchers 572
of and sent them on.

Q But they had nothing to do with this matter? A. It has nothing to do with this bill.

Q. They are not included in this lire 161.10? A. No.

Cross Examination by Mr. Burlingham:

Q. Can you recollect how many days before the 7th of May you had read in the papers about this unofficial agreement between the governments? A. Well, you

573 Antonio G. Scopinich.

know this understanding between the governments, that was only the last day, I think.

Q. What do you mean by the last day, the 7th? A. Yes. That was when we were finishing the loading.

Q. Had you had any telegrams or letters from Burrell & Son prior to that about these negotiations between Italy and Spain? A. No.

Q. Had your agent Peirce had any? A. Only the
574 Austrian. They hurried me up in the discharging, of course.

Q. Did Mr. Peirce, your agent there, or did you, have any communications, telegraphic or by letter, from Burrell & Son, with reference to the action of the Spanish Government with reference to sulphur? A. No.

Q. Did yon notify Burrell & Son by cable or letter of the fact that negotiations were being carried on between the Italian and Spanish Governments with ref-
575 erence to sulphur? A. No.

Q. You knew about it? A. About this?

Q. You read it in the papers? A. Yes, I was reading it daily, because they were a long time negotiating and without any conclusion. But the last day, as I said before, I heard that there was a temporary agreement for them to let the sulphur go free, but not officially. They would not give it officially.

Q. You began to put this sulphur out of the *Styria* on the 27th of April? A. As far as my memory goes.

576 Q. And you did not finish it until the 7th of May? A. The 7th of May.

Q. Now, during those ten days, you read in the papers every day—— A. (Interrupting) I was daily reading the papers.

Q. You read in the papers every day of negotiations being carried on between the Italian and Spanish Governments in reference to sulphur—whether it should be contraband or not—didn't you? A. I was reading the papers to see whether I could pick up any information worth——

Q. But you did see something in the papers abou negotiations that were being carried on? A. Yes, but not every day; it was not every day.

Q. Can you tell us the first day? A. About the end of the discharging.

Q. Towards the end? A. Yes; it might be two or three days before.

Q. And it looked as though they were coming to some kind of an understanding, did it not? A. It 578
looked as if they were.

Q. Why didn't you notify Burrell & Son then, and stop your discharging until you heard from them? A. Because I supposed they had the news themselves over there in England better probably—far ahead—than ourselves. Of course you know the telegraphic communications go over the world, and you hear them in America before you hear them in Europe.

Q. But the day before you sailed, on the 7th, you did read in the papers that the governments had come 579
to an agreement—to an understanding? A. Yes—not to an understanding, not to a safe understanding, but a temporary understanding, you know.

Q. To the effect that sulphur temporarily would not be treated as contraband of war? A. Yes.

Q. In spite of the previous proclamation? That was so, was it not? A. Yes, but the papers said not officially confirmed, you see. That meant, of course, they could withdraw it at any moment.

Q. The newspapers in which you read about these 580
things were what papers? A. I could not tell you. I believe the Sicilian "Courier;" I don't know; something like that; the paper published in Palermo—the largest paper published in Palermo.

By Mr. Regensburger:

Q. How long would it take a Palermo paper to reach you? A. About half a day, I think.

Q. Issued that day, you think, or the day before? A. The same day.

581 By Mr. Hill:

Q. Did you make these payments yourself? A. Yes.

Q. Did you pay all these moneys yourself? A. Yes.

Q. You had the coal aboard? A. Yes.

Q. You had that aboard? A. Yes. At the same time we reckoned it in the bill.

Q. You reckoned it at the price then prevailing at
582 Girgenti? A. Yes. Girgenti is a coal place; they do discharge cargoes of coal there.

Q. And so with the ropes. You had the ropes aboard, but you reckoned them at a price? A. At a price; at a fair price.

Q. At the price at Girgenti, or the price they stood you in? A. At a fair market price in Sicily and Austria. You understand, it does not vary very much.

By Mr. Reed:

583 Q. You say, captain, that you had vouchers for all these payments? A. They were sent to the owners, of course. Detailed accounts in connection with this bill. Some of the invoices we can't take; they have got to stop until the final sailing of the ship, and we only get a copy of this general account for our guidance.

Q. Then you cannot tell us now to whom you made these various payments—the persons to whom you made them? A. Oh, yes.

584 Q. The names? A. Yes. I made them to William Peirce, the agent. I paid him for those charges; except for the ropes and coal—of course, I didn't pay him that. But I mention the coal and ropes, so that it would not be forgotten,

Re Direct by Mr. Kirlin:

Q. Is that Peirce's receipt at the foot of the original exhibit, Claimant's Exhibit 17 for Ident? A. Yes.

Q. Translate that note at the foot of the original, Exhibit 17 for Ident? A. (Witness reading). "From

the above sum deduct Lire 2,678.88, because they were spent by the captain, and I got a receipt for Lire 11,621.37."

Q. What does that mean? Does that refer to the two items for coal and rope? A. Yes, for coal and rope.

Re-Cross by Mr. Reed:

Q. Is that the amount of the two items for coal and rope? A. Yes. This bill was made out to me as the master of the *Styria*; and by mistake they added also the expense of coal and ropes, which I objected to, because I could not pay this bill with the two amounts, because really I had paid that—or the owners had.

Q. So you gave them a draft for the difference? A. So instead of making another bill out, they deducted it at the bottom, with the words before mentioned.

Q. In other words, you did not disburse these items to these individual parties who rendered the services, but you gave this amount to Peirce? A. Yes. But the barrels I paid for myself—at least, to a different party—the empty barrels for discharging the sulphur.

Q. Do you remember the person's name to whom you paid for the barrels? A. No. But there is an invoice at Mr. Burrell's office.

By Mr. Kirlin:

Q. Who were your agents here for that voyage? A. Hirzel & Peltrann.

By Mr. Regensburger:

Q. Florio gave you the cargo which you took in place of the sulphur? A. Yes, of course. He is our general agent in Sicily. What contract Mr. Florio has got with the owners we don't know. He orders the ships to——

Q. Did you know before you had discharged the sulphur what other cargo you were going to take from Girgenti? A. I did not take any. They offered me

589 almonds, but I would not take them. It was a small parcel—more bother than anything else.

Q. Did you know before you had discharged the sulphur what cargo you were going to get? A. Before I discharged the cargo?

Q. Yes. You knew the cargo you were going to get in place of it, didn't you?

MR. KIRLIN: In place of this, you mean?

590 MR. REGENSBURGER: Yes.

A. No. I only had a telegram to follow Florio's instructions.

Q. Did Florio tell you anything before you discharged the sulphur as to what cargo you were going to get? A. No. And that was a thing I wanted to find out. For I didn't know anything. Because, if I knew the cargo she was going to take I would have ballasted the vessel a little more. And the proof is

591 this: That in Palermo I had to take ballast.

Q. Florio would not give you the information? A. I suppose it is not their custom to inform captains what they are likely to do.

Q. You tried to get information from Florio, but you did not get it? A. Of course I asked the agent, you understand, but he didn't know anything.

(Translation).

DISCHARGING EXPENSES STEAMSHIP *STYRIA*.

592 1898,

May 7, Expense of discharging under sail (lighters and men).....	*Lire*, 6,984	88
Weighers charges on delivery of sulphur ashore.....	279	39
Delivery clerk, keeping parcels separate.....	90	00
Payment to Customs' officials for overtime.....	59	00
Captain's account (No. 1) for ropes for unloading sulphur..	1,238	88

Antonio G. Scopinich. 593

Captain's account (No. 2) Coal bill (firing donkey boiler for unloading)	1,440 00	
Accounts paid to lawyers	300 00	
Ballast, 103 tons at 2 lire per ton	206 00	
Stevedore, hoisting sulphur from the hold, 2,150 tons at lire 1.10	2,365 00	
Men working the winches, 39 days, at lire 2.50	97 50	594
Power of Attorney to Notary Gaglio	10 60	
Carriage hire for Girgenti	18 00	
Carpenter, 6 days (coopering tubs on discharging	30 00	
Port charges	167 90	
Telegrams	161 10	
Cash to the Captain	652 00	
Damage to a Lighter	200 00	595
Total	*Lire* 14,300 25	

Charges in Captain's Statement of Expenses to his Owner Appertaining to the Discharge of the Sulphur.

1898,

May 7, 20 empty barrels (made into tubs) to discharge sulphur... *Lire*, 82 00 596

Port Empedocle, 7th May, 1898.

597 Henry De Thianich.

Deposition of HENRY DE THIANICH, taken on behalf of libellant in the first four entitled suits and the claimant in the second four entitled suits, upon notice and by consent, before James T. Kilbreth, Notary Public, at No. 5 Beekman street, New York, October 4, 1898:

NEW YORK, October 4, 1898.
11 o'clock A. M.

598 Present—Messrs. CONVERS & KIRLIN (by Mr. Convers) for libellant in the first four suits, and claimant in the second four suits.
Messrs. SULLIVAN & CROMWELL (by Mr. Hill) for Alfred S. Malcomson.
Messrs. BOWERS & SANDS (by Mr. Reed) for Schuyler L. Parsons.
Messrs. STERN & RUSHMORE (by Mr. Regensburger) for John Munroe *et al.*

599

HENRY DE THIANICH, called on behalf of libellant in the first four entitled suits and the claimant in the second four entitled suits, being duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Convers:

Q. What is your occupation and residence? A. I am a master mariner, a captain; residence in Trieste,
600 Austria.

Q. What vessel do you command? A. The *Abbazia.*

Q. How long have you followed the sea? A. Fifteen years.

Q. How long have you held a master's certificate? A. A master's certificate? A captain's certificate? Because we only have one certificate. Eleven years.

Q. How long have you commanded the *Abbazia?* A. Sixteen months.

Q. Who owns the vessel? A. The Austro Americana Company, an Austrian corporation.

Q. Who are the general managers? A. Burrell & Son, Glasgow.

Q. What is the gross or net tonnage of the vessel? A. 1,838 tons net register.

Q. When did you first receive any instructions with regard to a cargo of sulphur *ex* the *Styria*? A. During my stay at Trieste. Just two days before I left I 602
got instructions from Glasgow, from Burrell & Son, to proceed to Girgenti to load the sulphur that had been discharged by the *Styria* and bring it to New York.

Q. And when did you reach Girgenti? A I reached Girgenti the 24th of August, at 4 o'clock in the afternoon. I gave the same day written notice to my agent, Florio, who is at the same time one of the shippers, that the ship was ready to load.

Q. Proceed and state what took place with reference to your loading of the sulphur? A. During the time 603
we were in Girgenti?

Q. Yes. A. After I gave a written notice there, the agent told me that the cargo was sequestered, and that the storekeeper, who had been appointed by the Court, would deliver the sulphur when the shippers would authorize him to do so. But the shippers refused to give any authorization. So I went to Girgenti to confer with my lawyer and the shippers' lawyer. Port Empedocle is the sea port of Girgenti. I was obliged to go to Girgenti. We went together 604
to the shippers' lawyer, Mr. Consiglio, and we asked him if he could not start the loading—if he could get the authorization from the shippers. His authorization would have been just the same. He replied that he thought that there would be no opposition from the shippers, but meantime he would telegraph to them. The telegram was sent to them in my presence, asking them to authorize the storekeeper to deliver the cargo on board the *Abbazia*. At the same time I explained to the lawyer that the manager of the *Abba-*

605 *zia* and the consignees in New York had come to an understanding about this matter; and the lawyer told me that he had a letter from two of the shippers, and he showed me the letter, where the shippers said that they knew quite well that the managers and the consignees in New York had come to an agreement. After I left Dr. Consiglio I went back to Port Empedocle to prepare everything and start the loading for 606 the next day, hoping always that there would be no direct opposition from the shippers. But the next morning (the next morning was the 26th), instead of starting loading, I had a letter from my agent, in which he stated that the shippers refused to authorize the storekeeper to deliver the sulphur. Such being the case, I requested the agent to telegraph to the different shippers and ask them again the authorization—to telegraph one more time to them to authorize the storekeeper to deliver the cargo; and at the same 607 time I protested against them for all the damages consequent upon the delay. I sent a telegraphic protest. I produce a copy of the telegram and a translation of it. I omitted to state that Amato, one of the shippers, made no opposition.

Witness produces two copies of said telegram, one copy being addressed to Florio, at Palermo, and the other to Baller-Fog-Sofio, at Messina, and also a translation of said telegram.

608 Translation marked Libellant's Exhibit 1 for Ident., Oct. 4, 1898; Florio copy, Exhibit 1a for Ident.; Baller-Fog-Sofio copy, Exhibit 1b for Ident.

WITNESS: This is a circular telegram to all at once. (Witness reads translation): "Following Burrell "agreement with New York consignees sulphur, ex "*Styria*, your refusal to the storekeeper to permit "the said sulphur to be delivered on board the *Abba*-"*zia* is inexplicable. The Steamer is waiting here "ready to load since 3 days. I protest against you

"for all the damages and consequences of such delay. "Capt. Thianich." The date is August 27th, and it is addressed to all the shippers except Amato; it was addressed to Florio at Palermo, and Baller, Fog and Sofio, Messina. I produce the telegrams I had in answer from the shippers. (Witness produces telegrams and translations.)

Translation of telegram from Sofio, marked Libellant's Exhibit 2 for Ident., Oct. 4, 1898; 610
original marked Exhibit 2a for Ident.

WITNESS: The telegram from Sofio is as follows: "We are not cognizant of the agreement between Burrell and the consignees at New York, not having "any news from our constituents. We did not refuse "our consent to the judicial storekeeper, we have "only telegraphed to him informing him that we did "not care to prejudice ourself. At the same time we "telegraph New York asking instruction. Refuse to 611
"acknowledge your protest. SOFIO."

It is dated the same date.

The second one is from Fog, and is dated August 27th.

Translation of telegram from Fog, marked Libellant's Exhibit 3 for Ident., Oct. 4, 1898; original marked Exhibit 3a for Ident.

WITNESS: The telegram from Fog reads: "We don't "understand your asking our consent to deliver the 612
"sulphur, not having any interest in it. Requested "by the storekeeper, we telegraph him to act in ac-"accord with the Law. We refuse to acknowledge "your protest. FOG."

WITNESS: The next was from Florio, and is of the same date.

Translation of telegram from Florio, marked Libellant's Exhibit 4 for Ident., Oct. 4, 1898; original marked Exhibit 4a for Ident.

613 Henry De Thianich.

WITNESS: The telegram from Florio reads: "We "refuse to acknowledge your protest. We did not "refuse neither did we consent to deliver the sulphur, "which has been sequestered not by our instance but "by Capt. Scopinich (*Styria*). FLORIO."

WITNESS: The next is from Baller, and has the same date.

614 Translation of telegram from Baller, marked Libellant's Exhibit 5 for Ident., Oct. 4, 1898; original marked Exhibit 5a for Ident.

WITNESS: The telegram from Baller reads: "We "are ignorant of the agreement between your owner "and the New York consignees sulphur ex *Styria*; "we did not refuse our consent to the judicial store-"keeper to deliver the sulphur to the *Abbazia*. We "telegraph him to act according the Law. We refuse "to acknowledge your protest. BALLER."

615 Understanding that those firms were *siebbly* (a word meaning they did not refuse, but they did not consent)—the storekeeper was not intelligent enough to understand how the matter was, so he found out that the captain of the steamer and the shippers did not agree, and under such circumstances he refused to deliver the sulphur. When I found out that it was not possible to have the sulphur delivered from the storekeeper, I went to Girgenti—or my agent went to Girgenti—and
616 tried to get the authorization from the President of the Court to remove the storekeeper and find another one who would take the responsibility to deliver the cargo. That was the Sunday; that was the 28th of the month. The President of the Court authorized to remove the storekeeper and appoint in his place another storekeeper. This was all that was done in Girgenti.

After the transferment had been made between the one storekeeper and the other storekeeper we started loading. That was Monday, the 29th. But still we thought without the consent of the shippers we did not want to interfere. September 1st I had a letter

617

from my lawyer, a copy of part of which is here, because I translated only what was relevant. The whole letter is attached, but I translate only what is relevant to this matter. (Witness produces letter and translation.)

WITNESS: This is a letter from my lawyer, Mr. Loggia, ,to me, drted September 1st.

Translation of letter from Loggia marked Libellant's Exhibit 6 for Ident., Oct. 4, 1898; original marked Exhibit 6a for Ident. 618

WITNESS: The letter from Loggia reads: "Messrs. "Baller & Sofio have informed their lawyer that "Messrs. Burrell and the New York consignees came "to an understanding; therefore they consent the "sulphur to be loaded, and the causes pending before "the Judicial Court shall be annulled there."

I finished loading the 4th of September at 11 A. M., and left the same day for New York direct. 619

Q. State what expenses you incurred in releasing the sulphur and in putting it on board your vessel?

Witness produces statement. It is marked Libellant's Exhibit 7 for Ident., Oct. 4, 1898.

Witness refers to said statement, and answers as follows:

WITNESS: Towage of 2127 13-20 tons of sulphur at 30 Lira and 12c.....	Lira	6,638.44
Control to sulphur-weighing (official weigher), 7 days at 35 L.....	"	245.00
Surveyors on board	"	70.00
Custom House, overtime for loading, .	"	42.60
1st Custody (first store-keeper) indemnity (fees for the store-keeper, for the men).....	Lira	350
His expenses for the transferment.....	"	20
		370.00

620

621 The transferment means when we changed the storekeepers. The Court gets the 20 Liras.

2nd Custody, indemnity and expenses.. " 96.50

Lawyer account (amount deposited at the Court)..... " 1,000.00

That is the expenses; because I didn't pay the lawyer; I left the deposit.

622 I mean my lawyer. He got about 900 liras advance from the manager of the ships, and he wanted some 970 liras more, and I was obliged to make a deposit of 1,000 liras.

La Loggia bill; lawyer's bill to remove the sequester..... " 62.45

That was the lawyer's bill for the expenses of the Marshal in removing the sequester.

623 Bill for telegrams, traveling expenses to Girgenti, etc..... " 355.00

Those expenses were the expenses of myself and the agent of the shippers, and telegraphic expenses; the protest and the legal expenses, and traveling from Empedocle to Girgenti.

Certificate for substitution of ship..... " 12.40

Lawyer's advances..... " 900.00

Pilotage S. S. *Abbazia*..... " 56.25

624 That is the custom of the port.

Mooring and unmooring ship..... " 60.00

Stevedoring for sulphur..... " 638.25

Because the sulphur is brought alongside the ship, and they have to take it from alongside the ship and put it in the hold, and that is separate—that is stevedoring.

Port charges (anchorage charges..... " 2,811.00

Boat hire, 11 days..... " 55.00

625

This boat was employed, according to the custom of the port, to carry any one wishing to go to and from the ship, and the ship paid the expense.

Telegram and postage..... " 20.85

Agency fees. That is the commission of theagent of the *Abbazia*..... " 136.00

Demurrage, 3 days at pounds .25—75

Coal consumption,

626

30 tons at 10s. " .30 30/100 pounds sterling.

That coal was consumed, the ship waiting there the first day, and we used that coal. We did not know how the matter was to come out, how we should take the cargo in, and all those things; and the ship cannot load in the port; she is obliged to go outside the port and be loaded outside, and so the ship wants to be ready about twelve or eighteen hours before, and keep the engines and everything ready, and complete the cargo outside of the port. When you get the order to load you have to go outside the bar and complete the loading there.

627

Q. What is the total? A. The total is 13,579.74 Italian liras, and 105 pounds sterling. The rate of exchange is 26 liras on a pound sterling.

Q. What about the storage? A. I was obliged to pay storage—one per cent. on the quantity deposited—one per cent. in kind. So I left there one per cent. on the full total—the full lot; so much for each lot—proportionate for each lot. I left sulphur. The custom of the port is to take it in kind. The custom of the port is to charge one per cent. for one year and no less. If he is there one day or one year it is just the same.

628

By Mr. Hill:

Q. For one year, or for any less time? A. One year or one day, it is just the same; you pay one per cent.in kind.

629 Henry De Thianich.

By Mr. Convers:

Q. The total amount, then, of these charges and expenses is about how much? A. 13,579.74 liras, at the rate of exchange, 26 liras is equal to 522 pounds, 5 shillings and 11 pence; and the 10 pounds demurrage and coal makes a total of 627 pounds, 5 shillings, 11 pence; plus one per cent. of the full quantity of sulphur, taken in kind.

630 Witness: I produce the Customs Declaration, vised by the American Consul, and a translation of it.

Said Customs Declaration marked Libellant's Exhibit 8 for Ident., Oct. 4, 1898, and the translation Libellant's Exhibit 8a for Ident. of the same date.

Witness: This is dated the 4th of September. I left on the 4th. It reads as follows: "Customs House "of Port Empedocle. It is hereby certified by the
631 "undersigned that by the books of this Customs House "it appears that the sulphur, 2,194,621 Kilos, shipped "per S. S. *Abbazia*, flying Austro-Hungarian flag, "Enrico de Thianich, Master, on the days between "August 29th and September 4th, 1898, bound for "N. Y., covered by the bills of lading No. 43, 44, 45, "April 23rd, and 46, 47, 48 and 49, April 24th, same "year, is exactly that discharged temporarily here by "the Austro-Hungarian steamer *Styria*, Scopinich, "Master.

632 "The present is issued at the request of Capt. E. "de Thianich, on his declaration that it will not be "brought up in Court against the Administration of "Finance or its agents.

"Porto Empedocle, Sept. 4th, 1898.

"The Receiver."

That is, the Receiver of the Custom House. It has also the certificate of the Consular Agency of the United States at Girgenti, which reads: "I, the un- "dersigned, Consular Agent of the United States, do

" hereby certify the foregoing signature of Mr. E. " Angelozzi is genuine, and I furthermore certify that " said Mr. E. Angelozzi, as he styles himself, the Col- " lector of Customs at Porto Empedocle.

" Girgenti, 4th September, 1898

" FRANCIS CISTTA,
" U. S. Consular Agent."

WITNESS: I produce documents from the Custom House at Port Empedocle, in which is stated the quantity of sulphur loaded by the *Styria* and loaded by the *Abbazia*. (Witness produces said papers.) 634

Said papers, consisting of seven sheets, are marked Libellant's Exhibits 9, 9a, 9b, 9c, 9d, 9e and 9f for Ident. Oct. 4, 1898.

WITNESS: This is what they call the Exportation certificate, in which is declared what quantity of cargo the ship has taken on board; and the weight of it is controlled by the Collector of the Custom House office in Port Empedocle, which is the only authority on this matter. 635

Q. Explain what it is? The certificate on page 2 shows the quantity of sulphur loaded on board the *Styria*, and it shows as well, on the fourth page, the authorization from the General Director of the Customs in Palermo, in which he allowed, at the request of the captain of the ship, to discharge the sulphur; and then it testifies the quantity that has been loaded on board the *Abbazia* from the same lot. One lot of the *Styria* was loaded: 431 tons and 446 kilos; I took 416 tons and 770 kilos of this lot. 636

By Mr. Regensburger:

Q. This was all discharged in bulk, was it not? A. All in bulk, yes.

Q. When I say it was discharged in bulk, I mean was it discharged in one mass? A. Separate lots; each lot separate.

By Mr. Convers:

Q. I want to show the difference between the quan-

637 tity taken on board and discharged of each lot. You have given us one lot. Now give the next. A. The second export declaration: The *Styria* loaded 103,144 kilos, and the *Abbazia* loaded 100,173 kilos. The third one: The *Styria* loaded 103,144 kilos, and the *Abbazia* loaded 99,121 kilos. The fourth one: The *Styria* loaded 257,861 kilos, and the *Abbazia* loaded 249,555. The fifth one: The *Styria* loaded 515,723
638 kilos, and the *Abbazia* loaded 501,211. The sixth one: The *Styria* loaded 600,000 kilos, and the *Abbazia* loaded 576,180. The seventh one: The *Styria* loaded 257,861 kilos, and the *Abbazia* loaded 251,611.

And here is the per cent. list; that is the quantity brought here, and this is the quantity I had on board. (Witness indicating). The difference is one per cent. left; and, of course, you must allow in discharging sulphur, because of the dust; the wind will blow some of the dust of the sulphur away; so that they allow so
639 much per cent.

Q. Do you know what the amount of the percentage is that is allowed? A. It would depend on the weather, too. If it is blowing a little harder. They reckon about two per cent. or one and a half; between one and a half and two per cent.

Q. Dependent on the strength of the wind? A. Yes.

Q. Is this sulphur loaded while the vessel lies at the quay or in the stream? A. In the roads; in the river.

640 Q And how is the sulphur taken from the lighters alongside? A. From little lighters that come alongside

Q. The sulphur is in lighters alongside? A. Yes.

Q. And how is it transferred from the lighters to the steamer? A. We have little baskets; it is put in little baskets, about 40 or 50 or 60 pounds weight.

Q. How are these baskets transferred from the lighter to the steamer? A. They put outside of the steamer some hatches—I mean it is like a ladder; there are two or three men, and one gives it to the other, and it is

put in the hold. Every lighter carries only five or six tons of sulphur; they are little lighters. 641

Q And was any of this sulphur that was received on board weighed on the vessel? A. No. It is weighed on shore, under the control of the Custom House officers. They don't weigh it on board.

Q. Was the number of baskets that were carried from the lighters, the contents of which were emptied on board the *Abbazia*, tallied by those on board the *Abbazia?* A. No. Because the lighters come up—so many lighters come aboard—so many lighters they send from the shore; and the Custom House officers verify this. The distance is not far. 642

Q. In the transfer of the sulphur from the lighters to the vessel did you see any of it lost? A. No. It is never lost. Because the little lighter is alongside, and if any falls down it falls always on the same lighter; it is not possible for it to fall overboard; and we loaded in the daytime, we did not work night. 643

Q. And who handled these baskets in the loading from the lighters to the ship? A. Some men from the stevedores.

Q. Men from the shore? A. Yes, men from shore.

Q. Did any one from the ship have anything to do with that part of the work? A. Nothing; just prepared what they want and nothing else.

Q. What was done with the sulphur when it came on board? A. Where was it put? A. In the holds, each lot separate. 644

Q. Was it put at one part of the ship and then transferred to another part, or was it put in the home stowage at once? A. Where the sulphur was stowed there it remained. It was not removed.

Q. State where the sulphur was stowed—the different lots? A. (Witness looking at paper) The lot of 500 tons, Fog—that is, the original lot, I mean, always, the quantities corresponding to the quantities I gave. The original lot before loading was 500 tons from Fog; 350 tons were put in the No. 1 hold and

645 150 tons in the No. 4 hold—the top of the No. 4 hold. The Florio lot of 1,000 tons was stowed in the No. 2 hold and between-deck. The lot of 100 tons of Baller, in the between-deck, No. 3 hold. The lot of 250 tons Sofio, No. 3 hold. Lot of 100 tons, Amato, No. 4 between deck. Lot of 250 tons, Baller, No. 4 hold. That is how the sulphur was stowed on board.

646 Q. How was it stored on shore before it was weighed and put on board the *Abbazia*? A. It was in a separate yard—open. All the lots were separately kept there, and the sulphur weighed there.

Q. Do you know whether it is customary to stow sulphur in that way at that port? A. Yes. Because all the sulphur is stowed openly there; they have no closed warehouses; it is all open.

647 Q. After the cargo had been loaded on board did you take any other cargo before sailing for New York? A. Oh, I took a little quantity of almonds. That was separate.

Q. Were the hatches battened down all the way over from Girgenti to New York, or were they opened for ventilation? A. They were open when it was nice weather, of course. In bad weather they were closed.

Q. Did any water get down the holds during the voyage? A. No.

Q. Was any of the sulphur lost between Girgenti and New York? A. No, no sulphur lost.

648 Q. The sulphur discharged in New York was the quantity that you loaded on board at Girgenti? A. Yes.

Q. When did you arrive at New York, and where did you go to discharge your sulphur? A. I arrived in New York the 30th of September (that was on Friday) and went the next day to the foot of 42d street, Brooklyn.

Q. And did you then and there begin the discharge of the sulphur? A. Not on Saturday. I began the discharge of the sulphur on Monday.

Q. Was the vessel lying alongside the wharf, and was the sulphur discharged onto the wharf, or on lighters on the opposite side of the vessel? A. On the opposite side of the vessel—discharged in lighters.

Q. Where and by whom was the sulphur weighed that was discharged? A. The sulphur is weighed by the consignees—by the receivers' weighers.

Q. Where? A. On board—on deck.

Q. And how was it put from the deck aboard the 650
lighters? A. They take it with large—what you call——

Q. Tubs or buckets? A. Buckets, yes; with the winches.

Q. Are the buckets lowered on board the vessel by the ship's winches? A. By the ship's winches, yes.

Q. And who has charge of this work? A. The stevedores.

Q. Was any of the sulphur lost in discharging it on
to the lighters in New York? A. No; it can't be lost. 651
Only excepting so much per cent., which is the usual custom of the port here to allow for the dust.

Q. At the time of taking this deposition have you discharged all of the sulphur that is in the vessel? Is all your sulphur now discharged? A. No, not yet.

Q. About how much have you been putting out per day? A. We put out per day about 400 tons.

Q. And when do you expect to complete the discharge? A. On Saturday.

Q. Have you taken samples of the different lots? 652
A. Yes. Except one lot of Baller, because the Baller lot is under one lot of 100 tons, and if it will be free to-day I will take it.

Q. Will you take a sample of that and send it to me? A. Yes.

Q. Have you brought samples of the other five lots? A. Yes.

Q. Produce them.

Witness produces said five samples, and also a quantity in a wooden box.

653 Henry De Thianich.

Said samples are contained in tin boxes, and the tin boxes are marked respectively Libellant's Exhibits 10, 10a, 10b, 10c, 10d, for Ident., and the wooden box is marked 10e for Ident., Oct. 4, 1898.

Q. These samples are each contained in boxes, and each contain a paper stating the contents? A. Yes. I myself took the samples with the chief mate.

654 Q. What is the name of the chief mate? A. Mario Oliveti.

Q. Is he now present on board the ship? A. Yes.

Q. Will you produce him for examination on the written request of any of the proctors for the sulphur? A. Yes.

Proctors for the *Abbazia* will produce the sample of the remaining quantity of the sulphur as soon as it is uncovered, and it will be

655 marked Libellant's Exhibit 11 for Ident., Oct 4, 1898.

(Said sample of one lot of Baller to be produced and marked said Exhibit 11 for Ident.)

Q. How long have you run in the Mediterranean trade—between New York and Mediterranean ports? A. When?

Q. How many voyages have you made? A. Only for sixteen months.

656 Q. Prior to that where were you running? A. I was running with other steamers between England and South America, and Trieste and Fiume, Austria.

Q. And have you ever carried any sulphur except on this voyage? A. Yes. I have carried at other times sulphur.

Q. And have you carried sulphur before from Sicily to New York? A. Yes.

Q. And are you familiar with the proceedings incident to the port of loading? A. Yes.

Q. The Custom House proceedings and other neces-

sary proceedings for the shipping of sulphur and carrying it to New York? A. Yes.

Q. As soon as your vessel is discharged, or shortly thereafter, you are bound on a voyage to sea, and expect to sail with her? A. Yes.

Q. Was there any accident to the *Abbazia* on the voyage that could by any possibility have injured or lessened the quantity of sulphur on board? A. No; no accident. 658

Cross-Examination by Mr. Regensburger:

Q. Where did you take on your cargo of almonds? A. Girgenti.

Q. And did you take that on after you took on the brimstone? A. Oh, during the time. One day before I left I took on twenty tons only of almonds.

Q. The day you left? A. One day before I left.

By Mr. Hill: 659

Q. Captain, those figures that you gave us, do they show (I do not recollect, because there was so much of them) the actual expenses of loading the brimstone is distinguished from the separate and other incidental expenses to which you referred? A. They are expenses I had there.

Q. I know that. A. For loading the sulphur.

Q. I know that. But do they show the actual expenses for the loading itself, for the taking from the warehouse and transferring it to the vessel, as separate 660 from the rest of them? A. The expenses are all detailed there.

By Mr. Regensburger:

Q. I understand you to say, captain, that Amato assented to the taking of the 100 tons of brimstone which he had shipped to Munroe & Co. at the time of the request by you? A. Yes, Amato did not make any opposition.

Q. He consented? A. Yes.

661 Henry De Thianich.

MR. CONVERS: No claim is made against John Munroe for any delay or detention—Amato having consented on request of the ship's agent to the delivery of 100 tons.

Q. How many tons of brimstone, as a rule, do you load in a day? A. Where? Here?

Q. No. At Sicilian ports? A. About 400 tons.

662 Q. About 400 tons? A. Yes.

Q. And it would ordinarily take you five days to load 2100 tons? A. Six days.

By Mr. Convers:

Q. The same company owns the *Abbazia* and the *Styria?* A. Yes, the same company.

Q. And how many hours notice or days notice does the custom of the port of Girgenti or Empedocle require you to give before the shippers are bound to begin to load? A. By the custom of the port it would

663 be twenty-four hours after the ship's arrival.

Q. Is that after the ship's arrival or after the ship's notice of readiness? A. After the ship's arrival. Because after the ship sends the paper to the agent ——

Q. How much notice must the shippers have before demurrage begins? A. That you find out in the contract. You can show that in the contract—one of the contracts. I give written notice to the agent that 24 hours thereafter the shipper must begin to load the ship. The ship is advertised before the ship leaves

664 Trieste to the shippers that the ship is coming.

Q. You mean that the shippers are notified? A. Yes, notified before the ship leaves the port of Trieste, the home port, that she will be there on such and such a day ready to load. The shippers always get notice in time.

By Mr Hill:

Q. How long was that before? A. I can't tell you exactly. You can find out from the contract. It is in the contract.

665

By Mr. Reed:

Q. You don't know whether it was done at all? A. It was.

By Mr. Regensburger:

Q. How do you know? A. Because I saw a letter from Amato—because I saw a letter from Amato that the ship was coming.

Q. When did you reach Girgenti? A. The 24th.

666

Q. Where did you come from? A. Trieste.

Q. Empty? A. With a little general cargo for New York.

By Mr. Reed:

Q. Did you say that you had written to Amato? A. No; I saw a letter, I don't remember exactly whether it was Amato, but two of the shippers—I saw a letter where they say that they knew that the *Abbazia* was coming to take the cargo of the *Styria*; and our general agent there, Florio, gives notice to the shippers.

667

By Mr. Regensburger:

Q. You think he does? A. He does. I can testify that the owners have given notice to the shippers.

Q. You can't? A. I can testify.

Q. You know it is the custom for your agent to do it? A. I know too that the owner notified the shippers—to the agent—that the ship would be there.

Q. How do you know? A. I know because I read a copy of that letter there.

668

Q. Where? A. In Girgenti. This is a company that makes regular voyages; this company makes regular voyages; it is not one steamer chartered. They gave a separate contract; they have a contract between them. They must send so many boats; it is not only one boat going once a year, they have two or three boats a month there.

By Mr. Reed:

Q. That is the case when they are expecting to ship cargo? A. Yes.

Q. But when they are not expecting, that is different? A. But they were expecting to, because I telegraphed myself from Trieste.

Q. But you don't know whether they expected to ship anything by her? A. Who?

Q. The shippers in Girgenti? A. I read a letter that they knew the *Abbazia* was coming.

Q. But that does not show they were going to ship
670 anything by the *Abbazia* when she did come? A. Yes, they were going to take the cargo of the *Styria*.

Q. But, captain, all the shippers except Amato did not expect to ship any of the sulphur on the *Abbazia*, did they? A. Well, I don't say that it was him—I don't remember which was the letter—I know that I read one letter signed by two shippers—I can't exactly say which shippers they were, I should think it was Baller, or Sofio, or Amato—where they say they knew there was an understanding between Burrell and the
671 New York consignees that the *Abbazia* would come to Girgenti to take the cargo left by the *Styria*.

Q. You don't know when that letter was written? A. No, I don't know the date, but the letter is there; because it was a letter addressed to their lawyer, not to my lawyer.

By Mr. Regensburger:

Q. Did you know, captain, when you were at Girgenti, that the shippers of the brimstone on the *Styria*
672 had agreed with the owners of the *Styria* and the *Abbazia* to have the cargo taken from the Girgenti and sent on the *Abbazia* to New York? A. I don't know if they agreed or not.

Q. You didn't know it? A. I didn't know what agreement there was between them.

Q. Do you know of any stipulation that had been entered into between the shippers and the owners of the vessel? A. No, I don't know if there was any stipulation.

Q. You had not been informed of any? A. No.

By Mr. Reed:

Q. You had not been informed of that before you left Trieste? A. No.

By Mr. Hill:

Q. Then under the terms of this arrangement that you spoke of between Florio and the company it is Florio that is liable for demurrage if he keeps the ship from loading? A. Yes.

Q. Florio is liable to the steamship company? A. 674
He is the steamship agent.

Q. And he is bound to furnish cargo? A. Yes.

Q. And he is liable if there is demurrage? A. He is liable.

Re-Direct by Mr. Convers:

Q. Have you ever seen this contract between Florio and the owners? A. No.

Q. Then you have no personal knowledge of it? 675
A. No.

By Mr. Reed:

Q. That is the custom? A. That is the custom.

Q. That is the custom throughout the world generally? A. Well, that is the custom with us.

By Mr. Convers:

Q. Do you know of any agreement between Florio and the owners of the *Abbazia* that would require Florio to pay demurrage for not loading your vessel 676
within a certain number of days? A. No, I do not know whether there is any agreement between them.

Re-Cross by Mr. Regensburger:

Q. I understand you to say, captain, that Floric had a contract with your company to send a certain amount of cargo every time the vessel leaves Girgenti? A. No, not Girgenti; all over Sicily—consisting of sulphur and fruits.

677 Q. And he has either to send cargo or pay for the delay? A. Yes, if he doesn't give the cargo he has got to pay.

By Mr. Convers:

Q. Do you mean that he must give a certain quantity of cargo in a certain time, or that he simply agrees that the vessel shall receive a full cargo? A. What I
678 know is—I had instructions that each captain of each ship—that coming in Sicily we must load so much sulphur and so many fruits, and if we have not so much sulphur and so many fruits then we protest against Florio, and then they settle between themselves.

Q. And that is what you mean by what you have said when you said that Florio was liable to your owners for demurrage? A. Yes.

By Mr. Hill:

679 Q. Isn't it the universal custom everywhere that the person who is bound to furnish a cargo is liable for demurrage if there is delay in furnishing the cargo—if he holds the ship? A. Where?

Q. All over the world? A. In Sicily.

Q. In Sicily, yes. A. In Sicily it is with our company so, because it is a private contract with him; it is something private.

Q. But if the shipper holds the ship, delays it, because the cargo is not ready, then he pays demurrage, doesn't he? A. He must pay the ship, then.

680 Q. And the shipper in the case of your vessels is Florio? A. He pays to Florio.

Q. As between your company—— A. (Interrupting) and the shippers.

Q. And the shipper Florio is the man they look to? A. Yes.

Q. Your company looks to Florio? A. Florio; always; he is the agent.

By Mr. Convers:

Q. You mean that your company looks to Florio to

carry out their instructions as to loading? A. Their business. He has all the owner's business in Sicily; he is the general agent. 681

Q. And do you mean to be understood as saying that Florio is liable to your owners if he does not load your ship within a certain time—commence loading? A. Because my owners don't know what the ship is doing—what the shippers are doing; the owners don't know what the shippers are doing. 682

By Mr. Reed:

Q. How long would you wait for a cargo if one did not turn up there? A. Girgenti?

Q. Yes. A. I arrived on Wednesday and started loading on Monday.

Q. How long would you wait generally, supposing no cargo turned up? A. They send us away. They send us to other ports in Sicily to take fruits, &c.

Q. Who does, Florio? A. Florio, the agent. 683

By Mr. Regensburger:

Q. You did not issue any bill of lading for any of this sulphur, did you? A. No.

Q. Why was it that you did not issue any bill of lading to any one for this brimstone? A. Because they have been made before by the captain of the *Styria*. I brought the *Styria's* cargo. I knew what the bill of lading was to be. Another copy was to my lawyer; I suppose he sent it to my owner.

Q. Captain, when you discharge this brimstone you take it up in buckets, and then discharge it in the lighter through a buffer, don't you? A. Where, in Girgenti? 684

Q. No; here in New York? A. No. They take it in large buckets, and they discharge through a chute.

Q. Where is it weighed? A. It is weighed on board.

By Mr. Convers:

Q. The sulphur was weighed on the deck of the ves-

685 sel by the consignees when you discharged at New York? A. Yes.

Q. The lighters were the consignees' lighters, employed by them, and sent there for the brimstone, were they not? A. Yes.

Q. The lighters were not employed by the ship? A. No.

Q. Here in New York? A. No.

686 Q. And did these appliances by which the cargo was put aboard the lighters in New York belong to, or were they controlled by, the receivers of the cargo, or were they the ships? A. The stevedores and the receivers of the cargo.

By Mr. Regensburger:

Q. The weight taken by the owner is checked by your chief mate, isn't it—the weight is checked off by your chief mate? A. No.

687 Q. Don't you check the weight? A. No; only the consignees. It may be checked by the agent—

Q. Not by the ship? A. No. We don't check it.

Q. How do you know they deliver the full cargo? A. It is the consignees' weight.

Q. You don't check it? A. We don't check it.

Deposition of Henry De Trianich, recalled by consent for further cross-examination, taken at No. 5 688 Beekman street, New York, October 10, 1898:

By Mr. Reed:

Q. Captain, have you the statement of your disbursements in your hands which you presented here the other day? A. Yes.

Q. Will you please look at the first item, towage. Have you the vouchers for that disbursement—the receipted bill? A. This is the bill I had (Referring to Exhibit 7 for ident.). We took on board a copy, and the other copy was sent to the owner.

689

Q. That paper is the general account which you presented here the other day? A. Yes.

Q. But that is not the account rendered to you by the people who did the towage, is it? A. No.

Q. Have you that statement? A. No.

Q. Did you personally make these disbursements which are in this account? A. I signed the draft for them.

690

By Mr. Regensburger:

Q. Signed a draft for how much? A. For the total amount of the expenses.

By Mr. Reed:

Q. For the total amount of the expenses? A. Not for those expenses exactly, but for the total amount of the expenses I had for my stay in Girgenti, and for cargo expenses, and some other expenses—my private expenses. But the accounts signed by me are in the owner's hands.

691

Mr. Convers: We have sent for them, and will get them. They are not here.

Q. Now, taking that item of 42 lira and 60 c., customs over time, I should be glad if you will tell me again what that disbursement is? A. It is the custom of the port for people to work there till one destinated —fixed hours; and sometimes we are obliged to work about half an hour extra, you see, to finish one or two lighters that are alongside the ship, and for the permission to load over the fixed hours we have to pay about six lira per day to the Custom House.

692

Q. And that is this charged? A. That is the 7 days —42 lira, 60c.

Q. Did the lawyer for whose benefit you deposited that 1,000 lira render you a bill for the services? A. The lawyer's fees?

Q. The 1,000 lira? A. The account of the lawyer was about 1,946 lira.

Mr. Regensburger: We want to know whether he rendered him a bill.

693 Henry De Thianich.

WITNESS: The lawyer rendered an account for 1,900 and some odd lira. I sent the bill on; I have no bills with me.

Q. You have not the bill? A. No. I have no bills at all.

MR. CONVERS: We will produce any bill that the owners have.

694 Q. Did that bill describe what services he had rendered? A. Yes—all detailed.

Q. How much of a bill was it? A. For every shipper a separate bill.

Q. And did he render a long statement of the services which he had rendered? Do you remember whether it was a long bill or a short bill? A. Oh, it was a long bill.

Q. Captain, if you will look at your testimony on
695 page 12 (testimony shown witness), you will find, with reference to that 1,000 lira item, this statement: "He" (meaning your lawyer) "got about 900 lira advance from the manager of the ship." A. Yes.

Q. That is the item of 900 lira referred to on page 13, is it not, and which also appears in the statement as 900 lira? A. Yes.

Q. That is the same item, is it not? A. That is the same.

Q. And you did not pay him that? A. The 1,000?
Q. No, the 900? A. No, he got that from the
696 owners.

Q. You personally had nothing to do with that payment? A. No.

Q. I forget whether you said that Signor La Loggia was the same lawyer as the one to whom the 900 lira were paid? A. The same.

Q. May I ask you, once for all, have you any of the vouchers, or any of the bills, for any of these items here with you?

Mr. Convers: Except what bills I have produced and offered in evidence?

Mr. Reed: Yes.

A. I can produce only the bill for the port charges—anchorage fees; this is the only one; but I can't leave it here, because, when the ship comes to Italy, for his anchorage fees he pays so much per ton—if he stays one time my ship must pay 2,000 and so many lira; generally we pay in full for one year; that makes the bill—my bill is for about 9,000 lira; but I can't charge for 9,000 lira, when for only one stay of the ship we must pay two thousand and something.

Q. That is the way, then, that you have apportioned this charge of 9,000? A. That is the custom of the port. Yes.

Mr. Convers: I understand he has apportioned it for the lowest period for which he has made a payment.

By Mr. Regensburger:

Q. You do it on the theory of four trips a year? A. Yes. But, if the ship comes there once and stays twenty days, or fifty days, or one full month, he must pay the same charges.

Q. Captain, you made four trips that year—for the year? A. This is my first trip. But I just paid now, you see.

Q. How do you mean you just paid now? A. When the ship comes in Italy——

Q. I don't care about that. You made four trips, didn't you, for the fiscal year? A. No. This is my first trip. The payment is made from this day to another day, you see, for one year; and this is my first trip; I paid this just now; I began; and before the end of my year I will make perhaps four trips. If I don't make four trips, the ship losses the difference.

Q. Suppose you make five trips? A. I must pay.

701 Q. You must pay? A. New anchorage fees.

Q. It includes four trips? A. It includes it in one year. In one year, I can't have more than four.

Q. Suppose you make five trips? Do you have to pay the same? A. I have to pay more—extra—2,000 and so much more.

Q. And that you pay, whether you get a cargo or not? A. Get it or not. That is the anchorage fees—
702 so much a ton.

By Mr. Reed:

Q. This one was the first trip of the four? A. This one was the first trip of the year.

Q. Can you give me from recollection, referring to the bill for telegrams, expenses, travelling, &c., the items of that bill, amounting to 355 lira? A. The receipts for the telegrams, you can get them from the owner; but the receipts for the travelling expenses, I have none, of course.

703 Q Can you tell me from recollection to whom these various telegrams were sent and the various amounts of these telegrams—the amount paid for each telegram? A. I should not be able to recollect how much I paid for each telegram.

Q. Have you a memorandum of those disbursements that you made? Did you keep a little book in which you put down the disbursement that you made? A. No. I had the receipts from the telegram, and then the receipts will be sent to the owner, because the
704 owner himself wants to make out how the amount comes out, you see.

Q. And you have no recollection of the particulars of these items? A. No.

Q. With reference to the item of 638 lira for stevedore, do you recall who the people were to whom you paid the money? A. I paid it to the agent, and the agent paid it to the people that work there. These were his fees according to the custom of the port. You pay 30c. per ton.

Q. You simply paid it to the agent? A. I signed to the agent, and he paid it. 705

By Mr. Regensburger:

Q. This port charge entitles you to load in any port in Sicily? A. What do you mean?

Q. This 9,000 lira payment entitles you to load at any Sicilian port whatsoever? A. At any Sicilian—or Italian ports too.

Q. Any Sicilian or Italian ports? A. For all the kingdom. 706

Q. The whole kingdom? A. Yes.

By Mr. Reed:

Q. Going back a minute to the bill for telegrams and travelling expenses, some were expenses of other persons than yourself, were they not—the agent of the ship? A. For myself and for the agent—my telegrams, and the agent's telegrams to the different shippers, to the general agent, and for the manager. 707

By Mr. Regensburger:

Q. How much was your freight earned other than for sulphur on this trip? A. The Trieste cargo, you mean, or——?

Q. The Trieste and the fruit cargo? A. We had no fruit. We had only a little quantity of Trieste cargo. I can't tell you the freight.

By Mr. Hill:

Q. You said you took on a few nuts, I believe? A. At Girgenti, almonds, 20 tons of almonds. That was loaded in Girgenti, 20 tons at about 20 shillings per ton. 708

By Mr. Rensburger:

Q. Could you have taken more freight than you did on your passage over; did you have room for more freight on your passage over? A. No.

Q. You didn't get more freight, then? A. No.

709 Q. Did you try to get more freight? A. No, there was none to get.

Q. None to get? A. No sulphur and no almonds. We took all there was there.

By Mr. Hill:

Q. That question of freight, as I understand it, does not concern the owners—it concerns Florio? A. The owners take a separate contract with Florio. The
710 owners are obliged to send so many ships during one year of the contract, and then Florio loads them, and he must take so much cargo; if we have not so much cargo, then we protest for short cargo.

By Mr. Regensburger:

Q. Did you protest this time for short cargo? A. No; but this time was not the same, because this time——

Q. Did you protest this time for short cargo? A. I
711 did not for short cargo, no.

By Mr. Hill:

Q. The fact is that, except your personal travelling expenses and the telegrams that you personally sent, you did not pay out any of this money yourself, but you simply signed a draft for the total amount upon Florio's statement of what he paid? A. Yes.

Q. All the payments to the persons who received these moneys were made by Florio? A. Yes.

712 Q. And not by you personally? A. Not by me personally.

By Mr. Convers:

Q. Why didn't you protest to Florio against short cargo of this vessel? A. No, I had not short cargo; I had my cargo.

Q. I ask you why you did not protest in this case? A. I had my cargo; I could not protest.

By Mr. Hill:

Q. I understand you to say that Florio was bound

to furnish a certain amount of freight—not the full capacity of the vessel, but a certain amount. A. Yes.

Q. And this time he did furnish as much? A. This time he had nothing to do with my steamer, because I went there, I mean, out of the contract, to take only the *Styria* cargo.

Q. This was a special trip? A. Yes; it was to take the *Styria's* cargo and bring it here. 714

Q. The *Styria* cargo was a cargo originally furnished through Florio, was it not? A. Yes.

Q. And so it was Florio's cargo all the same as if it had been a regular trip—it was a cargo through Florio all the same? A. Yes, to be taken by the *Styria*.

Q. Then to be taken by the *Styria?* A. Yes.

Q. And now your owners sent you on a special trip to take the cargo that the *Styria* did not take? A. Yes; and for this Florio cargo Florio was only to support me as agent always. 715

By Mr. Regensburger:

Q. Do you know whether the *Styria* carried a full cargo when she came over? A. When she came here?

Q. Yes. A. She carried a full cargo.

Q. She got that from Florio? A. Yes.

By Mr. Convers:

Q. Have you any personal knowledge of that? A. No. 716

By Mr. Hill:

Q. Just as you know a lot of things—just as anybody knows? A. Yes.

By Mr. Regensburger:

Q. What you mean to say is that this was not a special trip to Girgenti, but you know when you got to Girgenti you would get this special cargo?

717 MR. CONVERS: I object to the question. The captain said nothing of the kind. I object to the form of the question as assuming a statement made by the captain which he did not make.

MR. REGENSBURGER: I understood him to say that.

718 Q. Is that what you mean to say, captain? A. What?

Question repeated: That this was not a special trip to Girgenti, but you knew when you got to Girgenti you would get this special cargo? A. I do not say that. I said I went specially to Girgenti to take the *Styria* cargo. That is what I said.

By Mr. Hill:

Q. But it was on your regular trips? A. Yes, it was one of my regular trips coming to New York.

719 CLAIMANT RESTS.

LIBELLANTS' PROOF.

Counsel for Morgan *et al.* refers to the testimony of the Captain of the *Styria* on pages 27, 29, 31, 32, 35, 43, 45, 46, 60, 67-69, 79-82.

720 Counsel for Malcomson reads in evidence letter from Department of State dated August 8, 1898, to Sullivan & Cromwell, being No. 17 annexed to the stipulation *Styria's* Exhibit D heretofore referred to.

Objected to as immaterial and irrelevant.

(Marked Malcomson's Exhibit D 17.)

Counsel for Malcomson reads the enclosure, being No. 18 annexed to said stipulation.

Objected to as immaterial and irrelevant.

(Marked Malcomson's Exhibit D 18.)

Alfred S. Malcomson. 721

Counsel for Malcomson reads in evidence papers annexed to said stipulation Nos. 19 to 26, being translations of articles published in the Giornale de Sicily, which it is agreed the captain saw.

Same objection.

(Marked Malcomson's Exhibits D 19 to 26.)

722

ALFRED S. MALCOMSON, being duly sworn and examined as a witness for libellants, testified:

By Mr. Hill:

Q. You are the libellant in the case of Malcomson against the *Styria*? A. Yes.

Q. What is your business? A. Importer of chemicals and sulphur.

Q. You import considerable sulphur? A. Yes, sir.

Q. You imported this cargo on the *Styria*, which 723
was forwarded on the *Abbazia*? A. Yes, sir.

Q. At that time were you engaged in the importation of other cargoes of brimstone from Sicily? A. Yes.

Q. Do you know whether any vessel containing a cargo of brimstone sailed from Sicily between the 25th of April and the 7th of May?

Objected to as immaterial and irrelevant.

Q. Did you import any brimstone on the *Lord War-* 724
wick?

Same objection. Allowed.

A. Yes, sir.

Q. When did she arrive? A. If you will allow me to refer to my papers I can tell you.

Q. Was she a steamer? A. Yes.

Q. From where? A. Sailed from Palermo, Sicily, in the latter part of April; arrived in New York May 19th.

725 Alfred S. Malcomson.

Q. With her cargo safe and in good order?

Same objection and ruling.

A. I had 500 tons on her.

Q. And the brimstone was carried through and landed in New York?

Same objection and ruling.

A. Yes.

726 Q. Did you about that time receive any brimstone by the *City of Truro?*

Same objection and ruling.

A. Yes, sir.

Q. When did she arrive and how much did you have?

Same objection and ruling.

A. She arrived May 18th at New York.

727 Q. From where? A. Sailed from Licata, Sicily. We had 2,150 tons on her.

Q. That came through all right and was landed in New York?

Same objection and ruling.

A. Yes.

Q. Did you have any on the *Europa?*

Counsel for *Styria* objects to importations on
728 any of these vessels as immaterial and irrelevant. Allowed.

A. Yes, sir. She arrived on May 26th at Portland, Maine.

Q. From where? A. She sailed from Licata, Sicily. We had 2,500 tons on her. Licata is one of the brimstone ports.

Q. That came through all right and was landed in Portland?

Same objection and ruling.

A. Yes, sir.

Alfred S. Malcomson. 729

By Mr. Burlingham:

Q. Who were the agents of these different steamers in New York? A. Funch, Edye & Co. were agents for the *City of Truro;* Hirzel, Feltman & Co. agents of the *Lord Warwick* and the *Styria.*

Q. Did you have any brimstone on the *Pocahontas?*

Same objection and ruling.

A. No.

730

Q. Do you know when she arrived? A. Early in May.

Q. Who were her agents? A. I can't tell you; Phelps Brothers, I think.

Mr. Burlingham: I have a letter here from Phelps Brothers, which Mr. Kirlin objects to.

Libellants Rest.

731

Counsel for *Styria* offers in evidence letters and documents marked "1 to 16" inclusive, attached to stipulation *Styria's* Exhibit D heretofore referred to.

Counsel for Malcomson objects to their admission as totally beside the question.

Counsel for Morgan objects to any negotiations of Burrell & Son, managing owners of the *Styria.*

The Court: It is not a question of the efforts made by Burrell & Son. I will admit what is contemporaneous You may put in all such inquiries and answers up to the time when the vessel left Sicily. 732

Counsel for *Styria* offers the said papers in evidence separately as follows:

No. 1. Dated May 9, from Burrell & Son to Foreign Office.

No. 2. Same date. Telegram in same terms to Secretary of British Embassy at Madrid.

No. 3. Telegram, May 10, from Madrid to Burrell.

733 No. 4. Telegram, May 10, from Foreign Office to London to Burrell.

No. 5. May 12. To Under Secretary of State by Burrell.

No. 6. May 12, from Foreign Office to Burrell.

No. 7. June 4, from Burrell & Son to Foreign Office.

No. 8. Telegram Burrell to British Embassy.

No. 9. Telegram, June 5, from Wolffe, Am-
734 bassador at Madrid, to Burrell.

No. 10. Letter from same to same.

No. 11. Telegram from Foreign Office.

No. 12. June 6, letter from Foreign Office to Burrell.

No. 13. July 1, Letter from Villiers, Under Secretary of Foreign Affairs, to Burrell.

No. 14. July 2. Inquiry on behalf of owners.

No. 15. July 8. From Foreign Office to Burrell.

735 No. 16. July 13. From Foreign Office.

Marked "*Styria's* Exhibits D 1 to D 14" inclusive.

Adjourned.

NEW YORK, February 16, 1899,

Met pursuant to adjournment.

Counsel for Malcomson offers in evidence statement
736 showing difference between export cost and proceeds of sale of brimstone belonging to libellant Malcomson, showing freight paid $2,182.56.

Objected to as immaterial and irrelevant.
(Marked Malcomson's Exhibit "H.")

Counsel for Parsons offers in evidence a similar statement on behalf of libellant Parsons, showing gross proceeds $7,402; freight paid $528; weighing $112.88.

Same objection.
(Marked Parsons' Exhibit "I."

Counsel for Munroe offers in evidence a similar statement on behalf of libellant Munroe showing sale of 92½ tons at $20.50 a ton; gross proceeds about $2,000. 737

Same objection.

(Marked Munroe's Exhibit "J."

It is agreed that the proceeds of sale of the Morgan sale was $4,513.46, being 243 tons and 2,174 pounds at $18.50 a ton; charges for freight $354.98, weighing $24.40. 738

COUNSEL FOR ALL PARTIES REST.

Claimant's Exhibits 1, 2, 3, 3a, 4 and 4a, being the bills of lading for the consignments of Morgan, Munroe, Parsons and Malcomson, shipped as alleged in the libels, all containing the same terms, exceptions and conditions, and being in the same form as Claimant's Exhibit 5, are omitted from the printed record by consent, claimant having the right to refer to said Claimant's Exhibit 5 for the terms, conditions and exceptions of the other bills of lading. 739

Marked Claimant's Exhibit 5 for identification June 8, 1898.—E. H. C. Sten.

Shipped in apparent good order and condition, by .....in and upon the steamship 740
called the.....whereof.....
is master for this present voyage and now lying in the port of.....and bound for.....
with liberty to call at any port or ports, in any rotation, in the Mediterranean, Adriatic and adjacent seas, or on the coasts of Spain or Portugal or in the Azores, or in North America, for the purpose of receiving and delivering coals, cargo or passengers, or for any other purpose whatsoever; to sail with or without pilots; to tow and Assist Vessels in all situations, although dev-

741 iating thereby from the voyage, and to carry Goods of all kinds, dangerous or otherwise, and with liberty to tranship any part of the cargo by steamer.

Said to be marked and numbered as per margin and to be delivered from the Ship's Deck, where the Ship's responsibility shall cease, in the like good order and condition, at the aforesaid Port of..... .. or so near thereunto as she may safely get the Act of God, The Queen s Enemies, Pirates, Robbers by land or sea, Jettison, Thieves, Vermin, Barratry of
742 Master or Mariners, Restraints of Princes and Rulers or People, Loss or damage resulting from any of the following perils, whether arising from the negligence, default, or error in judgment of the Pilot, Master, Mariners, Engineers, Stevedore, or other Persons in the service of the ship or any other ship belonging to or sailing under the flag of the company or otherwise, namely: Risk of Lighterage to or from the vessel, or of Craft or Hulk or Transhipment, Explosion, Heat, or Fire at sea, in Craft or Hulk, or on Shore, Bursting
743 of Boilers, Unseaworthiness arising from Breakage of Shafts or any latent defect in Hull, Machinery, or Appartenances, or free from the consequences of any damage or injury thereto, howsoever such damage or injury may be cansed, Collision, Stranding, Straining, or other perils of the seas, Rivers, Navigation, or Land Transit of whatever nature or kind soever and howsoever caused, excepted, with liberty (in event of Steamer putting back to this or into any other port or otherwise being prevented from any cause from com-
744 mencing or proceeding in the ordinary course of her voyage) to ship or tranship the Goods by any other steamer, and with liberty to proceed, under sail, or in tow of any other manner which the Ship's owner may deem fit, unto.

or to his or their Assign, he or they paying freight. the shipper also remaining liable for the same, for the entire quantity of goods therein enumerated, whether delivered sound or unsound, in cash, free of interest, on the Ships delivery, at and after the rate of

..... Shillings and..... ... 745
Pence British sterling per..... .....
with per cent. primage and average accustomed; or the equivalent thereof, payable in cash, without discount, at the rate of exchange current on the day of the Ships arrival for Banker's sight bills on London. Any average that may arise on the voyage to be adjusted according to York and Antwerp Rules.—Weight, Measurement, Gauge, Contents, Quantity, Quality Condition Brand and Value unknown and not accountable for loss or damage result- 746
ing from stowage, sweating, leakage, breakage, pilferage, wastage, rust, decay, rain, spray frost, thaw, effect of climate or heat of hold, bursting of bags, damage by rats, deterioration in quality, defects, slightness or insufficiency of packages, contact with or smell or evaporation, from any other goods, nor for incorrect delivery of goods, arising from inaccurracies, obliteration, insufficency or absence of marks, or numbers, or from any such being incorrectly stated in this bill of lading, or injury to wrappers how- 747
ever caused.

If said goods be of a perishable nature, such as green fruit, the consignee, his agents or assigns shall claim the same and pay the freight thereon within forty-eight hours after the same is ready for delivery, and in default thereof the charterers or their assigns may, at their option, sell such goods at public auction for account and risk of whom it may concern, and apply the proceeds of such sale as follows: To pay the expenses of such sale and all freight, custom dues, and 748
other charges properly chargeable to said goods, and to hold the overplus, if any, for account of whom it may concern, and if said proceeds shall not be sufficient to pay said freight, expenses, duty and other charges, such sale shall not prejudice the rights of the charterers to enforce collection of the remainder. Goods will be held free of charge for primage for five days from entry of steamer at Custom House. A charge for Primage of one-third (1/3) of one per cent. per Box per day will be collected for each box, for

749 every day held thereafter until and including the day of delivery. Not accountable for loss or damage, caused by heating machinery, if any, or connection thereof on Dock, where goods shall be discharged.

All fines, expenses, losses or damage which the Shipowner, or his agents, or servants, or the ship, or cargo may incur or suffer on accounnt of incorrect or insufficient marking of the packages or description of their contents, or the dangerous nature of such contents shall be paid by the Shipper or Consignee, as may
750 be required, and the Shipowner shall have a lien upon the goods for the payment thereof.

Simultaneously with the ship being ready to unload, the above-mentioned goods or any part thereof the Consignee of the said goods is hereby bound to be ready, to receive the same from the ship's side, either on the Wharf or Quay at which the ship may lie for discharge, or into Lighters provided with a sufficient number of men to receive and stow the said goods therein, and in default thereof, the Master or Agent of
751 the ship, and the Collector of above port are hereby authorized to enter the said goods at the Custom house, and land, warehouse, or place them in Lighters without notice to, and at the risk and expense of the said Consignee of the goods after they leave the Deck of the Ship, the Collector of the port of Discharge being hereby authorized to grant a general order for discharge immediately after entry of the ship.

The captain or owner has a lien on the goods for unpaid freights, through freights, average claims, or
752 liabilities incurred in respect of any charges stipulated herein, to be borne by the owners of the goods. Freight on Perishable Goods to be paid by the Shipper or Consignee, in whatever condition they may be delivered, if payable by shippers, in due in full in exchange for bill of lading and to be considered as earned, ship lost or not lost, and if payable by Consignee on arrival of goods at place of destination, in exchange for delivery order, settlement in either case to be made without discount or abatement. Freight on goods to

order, liquids and brittle or perishable goods, payable 753
by Shippers if required.

The Shipowner is not to be liable for any damage to any Goods which are capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods, nor for claim for damage or detention to goods under Through Bills of Lading where the damage is done or detention occurs whilst the goods are not in the possession of the Shipowner, nor in any case for more than the invoice or declared value of the goods, whichever shall 754
be the least. Not accountable to any extent for gold or silver, manufactured or unmanufactured; or in shape of coin, plated articles, glass, china, jewelery, precious stones, trinkets, nor for any other highly valued goods, unless the value be herein expressed and extra freight as may be agreed on be paid.

The only condition on which glass will be carried is that the Shipowner will not be held liable for any breakage which may occur, however caused.

Shippers will be held accountable for all damage 755
caused by goods of an inflammable, explosive or otherwise dangerous character, shipped without permission or without full disclosure of their nature, whether such shippers shall be aware thereof or not, and whether such shippers shall be Principals or Agents only, and such goods may be seized and confiscated or destroyed by the shipowner at any time before delivery, without any compensation to the Shipper or Consignee.

This Bill of Lading, duly endorsed, to be given in 756
exchange for delivery order.

In case of Blockade or interdict of the Port of Discharge, or if, without such blockade or interdict, the Master shall consider it unsafe for any reason, to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe at Shipper's risk and expense, and on the goods being placed in charge of any Mercantile Agent, or of British Consul, and a letter being put into the post office, addressed to the shipper and Consignee, if

757 named, stating the landing and with whom deposited, the goods to be at the Shipper's risk and expense and the Master and Owners discharged from all responsibility.

In event of Quarantine, the goods to be discharged on arrival into Quarantine Depot, Hulk, Lighter, or other vessel necessary for the ship's despatch, at the Consignee's risk and expense; or should this be impracticable or the vessel not admitted, or should communication subject the Steamer to Quarantine at a
758 subsequent port of call, the Master to have the option, and is hereby authorized to land the cargo, at the nearest safe port to which the vessel is bound, at the risk and expense of the Consignee; and on the goods being placed in charge of any Mercantile Agent, or of the British Consulate, a letter being put into the Post office, addressed to the shipper and consignee, if named, stating the landing, and with whom deposited, the goods to be at the Shipper's risk and expense, and the Master and Owners discharged from all responsi-
759 bility.

Notice.—In accepting this bill of lading, the Shipper or other Agent of the property carried, expressly accepts and agrees to all its stipulations, exceptions, and conditions, whether written or printed.

In witness whereof the Master or Agent of the said Ship hath affirmed to Bill of Lading all of this tenor and date, the one of which bill being accomplished, the others to stand void.

760 Not accountable for wrong marks or numbers.

Dated in.....this.....18....

With liberty either before or after proceeding towards the port of discharge, to proceed to and stay at, any ports or places whatsoever (although in a contrary direction to, or out of or beyond, the route to the said port of discharge), once or oftener, in any order, backwards or forwards for loading or discharging cargo or passengers, or for any other purpose whatsoever, and all such ports and places, and sailings shall be deemed

included within the intended voyage. This liberty is not to be considered as restricted by any words in this contract, whether written or printed. 761

Said to be marked as per margin, it is specially stipulated that no claim is to be made by the Shipper or receiver for any loss arising from difference in marks or contents.

If during the Winter Season the within mentioned goods are discharged at a dock fitted with heating machinery a charge of 1/3 of one cent (United States currency) per box per day will be levied upon all boxes (accidents to machinery, etc., always excepted). 762

I. & V. Florio.

PALERMO.

(Flag)

Transoceanic Line,

William J. Peirce,
Agent,
Girgenti—Porto Empedocle.

Freight Ls..... 763

....

Claimant's Ex. 6—Mongan, June 8/98.

Porto Empedocle, 27th 4, 1898.

Signori John Sofio & Co.,
Messina:

Ritenendo Rischioso il mio viaggio per Nuova York coll' attuale carico zolfo per fatti di Guerra vi prevendo che scarico qui la vostra merce per vostro conto e rischio sontto cura dell' Agente mercantile Signor William Peirce depositandola nei magazzini del Signor Lenobio Urso gin e sequesti non fossero sufficienti nei magazzini di cotesto consolato Inglese faccolta che tengo in forza delle polizzi di carico. 764

Graditi i mici piu cordiali saluti,

Antonio Scopinich,
Capitano del Piroscaso
Styria.

765 Claimant's Exhibit 7, Malcomson, and Claimant's Exhibit 8, Baller, bear the same date and are in the same form as the foregoing, except that they are addressed respectively to the Canadian Bank of Commerce and Ferdinando Baller & Co. They are therefore omitted by consent. Claimant's Exhibit 9, the translation of the foregoing appears in the deposition of Scopinich at page 142.

Claimant's Exhibit 10, letter sent to Austrian Consul (translation) appears in the deposition of Scopinich at
766 page 142.

Claimant's Exhibit 11, (translation) letter sent to director general of customs appears in the deposition of Scopinich at page 145.

Claimant's Ex 12.

Porto Empedocle, 7 Maggio '98.

767 Egregi Signori:

Fo seguito alla mia 27 p. p. comunicaudovi che la partita Zolfo da voi caricata a bordo il Vapore Austriaco *Styria* per New York, trovasi a vostio rischio e spesl nei magazzini del Signor Zenobio Urso, qui, e tostochi mi rimborserete le spesl qui fatte per vostro conto in conformita della Polizza di carico, il detto zolfo vi sara conseguato.

Vi saluto distintamente

Antonio G. Scopinich,

768 Comandante il Vapore,

Austriaco *Styria*.

Addressed

Vi Signori

J. Sofio & Co.,

Messina.

Claimant's Ex. 13 bears the same date and is in the same form as the foregoing except that it is addressed to Ferdinando Baller & Co. It is therefore omitted by consent.

Claimant's Exhibits 14 and 15, being translations of 769
Claimant's Exhibits 12 and 13 appear in the deposition of Scopinich at page 148.

Claimant's Exhibit 16 is the same as Parsons' Exhibit F 6, February 14, 1899, and is printed at page 337 of the record.

Styria's Exhibit A.—Translation Protest Sofio— 770
Morgan.

In the year eighteen hundred and ninety-eight, on the 2nd of May, in Porto Empedocle.

At request of Messrs. John Sofio & Co., of Messina, as representatives of Messrs. James L. Morgan & Co., of New York, in their interest and anybody elses whom it may concern.

I have declared to the captain, A. G. Scopinich, of the Austro-Hungarian steamship *Styria*, now anchored 771
in this port, that,

As captain loaded on the 23d of April last for a/c and in the interest of above mentioned firm the quantity of two hundred and fifty tons of sulphur into his ship, as per freight contract, and as above captain discharged and deposited the mentioned quantity of sulphur in this Porto Empedocle, which has as consequences great damage to the interest of petitioners and whom they represent, they protest through me against Captain Scopinich and against his owners, holding them responsible for all damages, expenses, loss of in- 772
terest and profits and damages that can be attributed to their action and over which if necessary the magistrate will decide.

The present copy signed by me has been notified to above Captain Scopinich on board of his steamer, and was handed by me over to him personally at a quarter past four. Cost as in original, £11 3 0.

(Signed) GIRLANDO SCHANBRI.

773 **Styria's Exhibit B.**—Answer of Master—Translation.

In the year eighteen hundred and ninety eight, 17th of May, in Messina. At request of Mr. Antonio Girolamo Scopinich, captain of the Austro-Hungarian steamship *Styria*, which already anchored in Porto Empedocle, and now on her voyage.

I, the undersigned clerk to the civil tribunal of Messina, have notified, and with the present, give an iden-
774 tical copy to Messrs. John Sofio & Co. here, with all due respect which can be shown to them of the superior ricourse and relative decree of the Praetor in Girgenti, with which petitioner is authorized to proceed with the sequestration of the sulphur in question.

And this is to be known and for every effect of the law.

And I also notified to them that same had been executed in Porto Empedocle under the clerk, Travali, on the 8th inst.

775 At the same time and at the same request I have summoned the mentioned firm to appear before the civil tribunal of Girgenti, for the sitting of the twenty-first of June, at the legal hour, in the usual locality, to listen to the judgment of the following questions:

Considering the above mentioned facts in the superior ricourse.

Considering the decree of which the above is the equestration.

Considering the right of the tribunal of Girgenti to
776 decide with reference to the action.

Considering that as per law and agreement the discharging expenses have to be reimbursed by shipper, who has also to pay the store rent.

Considering everything else

It may please the Tribunal to confirm the sequestration as per foregoing sentence, the mentioned firm to pay to Pursuer the sum of one thousand eight hundred lire, being amount of expenses incurred in discharging the cargo, also to pay the store rent in which the sul-

phur has been deposited, viz., one per cent. per year 777
or fraction of year.

Sentence them to pay the expenses of the sequestration and of this judgment; order the sale of the sulphur sequestrated handing over to Pursuer the sum so far as to cover his credit for expenses incurred; order the provisorial execution of the sentence with reserve of other and more important rights.

For Pursuer will act Advocate Enrico La Loggia, legal procurator, practicing with his collegs of Girgenti. 778

Copy of this present act, and of the above mentioned ricourse and decree, signed by myself, was taken by me to the address of Messrs. John Sosio & Co., handing same over to a person in their employ capable of receiving same, as I could not find personally the representative of above firm.

(Signed) ANTONIO ALLEGRO.

Styria Exhibit B 1.—Answer of Master—Translation. 779

In the year eighteen hundred and ninety-eight, on the fifth of May, in Messina.

At request of Mr. Antonio Scopinich, qual capitano of the SS. *Styria* of Austrian flag, now anchored in Porto Empedocle,

I, the undersigned clerk to the civil Tribunal of where I reside, have declared to Messrs. John Sofiio & Co. of Messina, with all due respect, that Petitioner 780
rejects the protest intimated to him on the 30th of April through the clerk, Giovanni Marrione. Petitioner in discharging cargo preceeded as was his right and in the interest of the goods. This is confirmed by the fact published in the papers and discussed in the Italian parliament, that sulphur had been declared contraband of war by one of the fighting nations.

As per law and agreement with petitioner, the sulphur was discharged for a/c and risk of shippers except their relations with consignees.

781 Petitioner in the meantime protest against all delay, expenses and damages which they may suffer through the obstinacy of Messrs. John Sosio & Co., and asks them to reimburse all expenses of discharge, etc.

This good for any effect of the law.

Copy of this act signed by me has been taken to the address of Messrs. John Sosio & Co., and I handed it over to a person of their employ capable of receiving same.

(Signed) ANTONIO ALLEGRO.

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Styria's Ex. C.—Stipulation as to Shipment of Sulphur.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MALCOMSON *et al.*
AGAINST
The Steamship STYRIA, etc.

786

MORGAN *et al.*
AGAINST
The Same.

PARSONS *et al.*
AGAINST
The Same.

787

MUNROE *et al.*
AGAINST
The Same.

It is stipulated and agreed between the parties as follows:

788

1. The claimant shall forward the cargo landed ex *Styria* at Port Empedocle, on the first available steamer from that port to New York, and shall deliver the same to the consignees, upon the terms and for the freight specified in the original bills of lading, the consignees to receive the same and to pay the agreed freight on right and true delivery; the goods upon arrival to be sold at current market rates and the proceeds, less charges incurred, to be credited on account

789 of the damages, if any, recovered in these cases by the libellants.

2. The claimant shall have a lien on the portions of the cargo to be delivered to the several libellants for the respective amounts of the charges against the respective portions of the brimstone in Sicily, provided the claimant was justified in relanding and storing the cargo at Port Empedocle as and when he did. If it be held that the relanding and storage of the cargo was
790 not justified, then the said brimstone shall be free from any lien on account of the aforesaid charges or expenses, except freight, which is provided for in paragraph first of this stipulation.

It is the purpose and intent of this paragraph of the stipulation to provide that if the claimant was justified in relanding and storing the cargo as and when he did, he shall have a lien upon the respective consignments for their respective proportions of the charges and expenses against the same, which the libellants would
791 have had to pay (exclusive of the charges provided for in the first paragraph of this stipulation), if they undertook to forward the cargo for their own account.

3. This stipulation and anything done by any party under it shall be deemed to be wholly without prejudice in the pending suits, except as herein provided.

New York, August 12th, 1898.

Sullivan & Cromwell,
Proctors for Malcomson *et al.*

792 Cowen, Wing, Putnam & Burlingham,
Proctors for Morgan *et al.*

Bowers & Sands,
Proctors for Parsons *et al.*

Stern & Rushmore,
Proctors for Munroe *et al.*

Convers & Kirlin,
Proctors for S.S. *Styria.*

Styria's Ex. D.—Stipulation as to reading of documents on trial, with 26 documents annexed. 793

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES L. MORGAN *et al.*

AGAINST

The Steamship *Styria*. 794

SCHUYLER L. PARSONS

AGAINST

The Same.

ALFRED S. MALCOMSON

AGAINST

The Same. 795

JOHN MUNROE & COMPANY

AGAINST

The Same.

AUSTRO-AMERICANA S. S. Co.

AGAINST

100 Tons Brimstone owned by JOHN MUNROE, *et al. ex Abbazia*. 796

The Same

AGAINST

3,250 Cantars of Brimstone, owned by JAMES L. MORGAN *et al. ex Abbazia*.

797 The Same

AGAINST

1,500 Tons Brimstone, owned by MALCOMSON *ex S. S. Abbazia.*

The Same

AGAINST

798 4,550 Cantars of Brimstone, owned by SCHUYLER L. PARSONS *ex Abbazia.*

It is hereby stipulated between the parties as follows:

(1.) That the claimant and cross-libellant may read upon the trial of these causes newspaper articles or items concerning the proclamation of war issued by the Queen Regent of Spain, dated April 23, 1898, from the Gaceta de Madrid, published April 24, 1898, and
799 the translation thereof published in the London Gazette of May 13, 1898 (pp. 2740, 2741); also newspaper articles or items concerning the proclamation of neutrality issued by the Queen of England, dated April 23, 1898, from the London Gazette of April 26, 1898 (pp. 2586, 2587, 2588).

(2.) That the claimant and cross-libellant may read upon the trial of these causes the annexed letters and telegrams, marked Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16, which passed between the man-
800 aging owners of the *Styria*, the British Foreign Office and the British Embassy at Madrid, as appears by the respective documents, and that Miller & Son, Miller & Company, and the Secretary to the Newcastle Protection & Indemnity Association, who wrote and received certain of the letters, acted in the said managing owners' behalf.

(3.) That the libellants and cross-claimants may read upon the trial of these causes the annexed letters, marked Nos. 17 and 18, which passed between the rep-

resentatives of the libellants and the office of the Sec- 801
retary of State at Washington.

(4.) That any party may read upon the trial of these causes certain newspaper articles, of which translations are hereto annexed, numbered 19 to 26, inclusive, which appeared in the "Giornale di Sicilia," a newspaper published at Palermo, in issues Nos. 115, 117, 118, 120, 121, 123, 125, 127, dated respectively April 24–5, April 26–7, April 27–8, April 29–30, May 1–2, May 3–4, May 5–6, May, 7–8, and were read by the captain of 802
the *Styria*.

(5.) That any party may read upon the trial of these causes, from the bundle of documents marked "Protests and answers thereto" any protest served upon the master of the *Styria*, by or in behalf of any owner and shipper or any reply made by the master to any such protest.

(6.) That any and all documents read pursuant to this stipulation shall be subject to the objections of im- 803
materiality, irrelevancy and insufficiency.

(7.) That it is not the intention of any party to this stipulation to admit the existence or the accuracy of any matter of fact stated in any of the above mentioned documents or papers, but the Court is hereby authorized and empowered to draw such inferences of fact therefrom as may seem to it to be warranted.

Feb. 14, 1893.

SULLIVAN & CROMWELL,
Proctors for Malcomson, Libellant and Claimant. 804

COWEN, WING, PUTNAM & BURLINGHAM,
Proctors for Morgan.

BOWERS & SANDS,
Proctors for Parsons.

STERN & RUSHMORE,
Proctors for Munroe.

CONVERS & KIRLIN,
Proctors for Clt. & Cross Lbt.

805

Styria Ex. D1.

No. 1.

COPY TELEGRAM.

9th May, 1898.

UNDER SECRETARY OF FOREIGN AFFAIRS,
Foreign Office,
London.

We manage line of steamers running Sicily to States.
806 Spain declared brimstone to be contraband, but it is now reported from Sicily that restriction removed at request of Italian Ministry. Is brimstone non-contraband and can any neutral vessel carry it to States. Kindly telegraph.

BURRELL, Shipowners,
54 George Sq.

807

Styria Ex. D2.

No. 2.

COPY TELEGEAM.

9th May, 1898.

SECRETARY,
British Embassy,
Madrid.

We manage line of steamers running Sicily to States. Spain declared brimstone to be contraband, but it is
8.8 now reported from Sicily that restriction removed at request of Italian Ministry. Is brimstone now non-contraband, and can any neutral vessel carry it to States. Kindly telegraph.

BURRELL, Shipper,
53 George Square.

Styria Ex. D3.

809

No. 3.

COPY TELEGRAM.

10th May, 1898.

BURRELL,
54 George Sq.
Glasgow.

Orders have been given not to treat sulphur for the present as contraband war.

810

SECRETARY OF BRITISH EMBASSY.

Styria Ex. D4.

No. 4.

COPY TELEGRAM.

10th May, 1898.

Messrs. BURRELL,
Shipowners,
54 George Square,
Glasgow.

811

Spanish Government state that decree already issued cannot be altered, but that as temporary measure Naval departments have been ordered not to treat sulphur as contraband of war, they lay stress on the fact that the measure is temporary only.

UNDER SEC'Y OF STATE, FOREIGN OFFICE.

812

813 **Styria Ex. D5.**

No. 5.

COPY TELEGRAM.

12th May, 1898.

UNDER SECRETARY OF STATE for
Foreign Affairs,
Foreign Office,
London.

814 Referring to your telegram to us of tenth inst. it is rumoured that Spanish Government yesterday declared sulphur non-contraband, kindly wire whether temporary relaxation you reported has been made permanent or still remains temporary.

BURRELL, Shipowners,
54 George Square.

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815 **Styria Ex. D6.**

No. 6.

COPY TELEGRAM.

12th May, 1898.

Messrs. BURRELL,
Shipowners,
54 George Square,
Glasgow.

816 Your telegram of to-day no later information received.

UNDER SECY. OF STATE,
Foreign Office.

Styria Ex. D7. 817

No. 7.

4th June, 1898.

UNDER SECRETARY OF STATE,
Foreign Office,
London.

DEAR SIR:

We have received the following telegram from correspondents in Sicily: 818

> "Spain notifies, Italy confirming, sulphur "temporarily not considered contraband. In- "structed Navy accordingly. (If) should later "decide suspension, previous notice will be "given, but steamers loading underway, or con- "contracted will be respected."

It would seem from the above that Spain has made a fresh notification regarding sulphur, and as the matter is of much moment to us, we would be glad if you 819 telegraph us saying whether the report is correct.

We are, Sir,
Your most obedient servants,
(Sgd) pro. BURRELL & SON,
ROBERT DUNCAN.

THE UNDER SECRETARY OF STATE
for Foreign Affairs,
Foreign Office,
London,
S. W. 820

821

Styria Ex. D8.

No. 8.

COPY TELEGRAM.

4th June, 1898.

SECRETARY
British Embassy,
Madrid.

We are informed that Spain notifies sulphur temporarily not considered contraband and has instructed
822 Navy accordingly. Should it later decide on suspension previous notice will be given fixing date, but steamers loading, underway, or contracted will be respected. Kindly telegraph whether this report correct.

BURRELL,
Shipowners.

Styria Ex. D9.

823

No. 9.

COPY TELEGRAM.

5th June, 1898.

BURRELL,
54 George Sq.,
Glasgow, Escocia.

Information in your telegram yesterday substantially correct am writing

WOLFF.

824

825

Styria Ex. D10.

No. 10.

MADRID, 5th June, 1898.

GENTLEMEN:

Referring to the Ambassador's telegram of to-day, I am directed by His Excellency to state to you that this Embassy are informed by the Ministry of State that the temporary suspension of the treatment of sulphur as contraband of war will not be revoked without notice, and that in case of revocation it would not affect 826
vessels at sea in ignorance of it, and time (plazo prudencial) would be given for the execution of pending contracts.

I am,

Gentleman,

Your obedient servant,

(Sgd) GEORGE BARCLAY,

Secretary at

H. M. EMBASSY.

MESSRS. BURRELL & Co., 827

54 George Square,

Glasgow.

Styria Ex. D11.

No. 11.

COPY TELEGRAM.

6th June. 1898. 828

BURRELL,

54 George Square,

Glasgow.

Report is substantly correct details by post.

UNDER SECRETARY OF STATE,

Foreign Office.

829

Styria Ex. D12.

No. 12.

Foreign Office, 6th June, 1898.

GENTLEMEN:

With reference to my telegram of this day's date, in reply to your letter of the 4th instant, I am directed by the Marquess of Salisbury to state to you that Sir Drummond Wolff, Her Majesty's Ambassador at Madrid, has been informed by the Spanish Minister for
830 Foreign Affairs that the treatment of Sulphur as contraband of war will be temporarily suspended, and that the order to that effect will not be revoked without notice.

The Minister added that eventual revocation of the order will not, in any case, apply to vessels at sea in ignorance of it, while the necessary time will be given for the execution of pending contracts.

I am,

Gentlemen,

831 Your most obedient humble servant,

(Signed) F. H. VILLIERS.

Messrs. BURRELL & SON,
54 George Square,
Glasgow.

Styria Ex. D 13.

832 No. 13.

(Foreign Office Seal)

FOREIGN OFFICE,
July 1st, 1898.

GENTLEMEN:

In reply to your letter of the 30th ultimo, I am directed by the Marquess of Salisbury to state that Her Majesty's Ambassador at Madrid has been informed by The Spanish Government that the treatment by them of Sulphur as Contraband of War will be temporarily suspended and that the order, which has been

given by them to that effect, will not be revoked without due notice. 833

His Excellency was also informed that the eventual revocation of the Order would not, in any case, apply to vessels at Sea in ignorance of it while the necessary time would be given for the execution of pending Contracts.

I am,
Gentlemen,
Your most obedient
humble servant, 834
F. H. Villiers.

Messrs. T. Miller and Son,
9, Great St. Helens,
E. C.

Styria Ex. D 14.

No. 14

Copy 835

9 Gt. St. Helens,
London, E. C.
2nd July, '98.

To the Under Secretary of State
(Treaty Department)
Foreign Office
Whitehall, S. W.

Sir

We have the honour to acknowledge receipt of your favor of yesterday's date, and are obliged to you for 836 the information contained therein.

We beg to point out that the information we desire is as to the notice given by the Spanish Government that Sulphur would not be treated as contraband of war. What notice was given of this and on what date?

We regret to give you this further trouble but the matter is of importance.

We have the honor to remain
Your humble obedient servants
(Signed) Thos. R. Miller & Son (Managers)

837

Styria Ex. D 15.

No. 15.

(Foreign Office
Seal)

FOREIGN OFFICE,
July 8th, 1898.

GENTLEMEN: [redacted]

In reply to your further enquiry of the 2nd instant, I am directed by the Marquess of Salisbury to state for
838 your information, that on the 6th of May last, as a result of representations made by Great Britain and Italy, the Spanish Minister for Foreign Affairs informed Her Majesty's Ambassador at Madrid—he having previously informed the Italian Ambassador to the same effect—that while the Decree of April 23rd, a copy of which is enclosed, could not be altered, orders would be given to the Naval Department, as a temporary measure, not to treat sulphur as contraband of war.

On the 31st of May the Spanish Minister addressed a
839 note on the subject to Her Majesty's Ambassador at Madrid the purport of which was communicated to you in my letter of the 1st instant.

The Secretary of State has no further information nor is he aware that any public announcement on the subject was issued in Spain.

I am,
Gentlemen,
Your most obedient, humble servant,
F. H. VILLIERS.

840 Messrs. MILLER & COMPANY,
United Kingdom Mutual Steamship
Assurance Association, Limited.

Styria Ex. D 16. 841

No. 16.

(Foreign Office Seal)

FOREIGN OFFICE,
July 13, 1898.

SIR:

In reply to your letter of the 5th instant, respecting the discharge at Girgenti of a cargo of sulphur from the steamship *Styria*, I am directed by the Marquess of Salisbury to state, for the information of the New- 842
castle Protection and Indemnity Association, that on the 6th of May last, as a result of representations made by Great Britain and Italy, the Spanish Minister for Foreign Affairs, who had previously informed the Italian Ambassador in the same sense, verbally stated to Her Majesty's Ambassador at Madrid that while the decree of April 23rd could not be altered, orders would be given to the Naval Departments, as a temporary measure, not to treat sulphur as contraband of war.

On the 31st of May the Spanish Minister stated in a 843
note to Her Majesty's Ambassador at Madrid that the treatment by Spain of sulphur as contraband of war would be temporarily suspended, and that the order which had been given to that effect would not be revoked without due notice.

His Excellency was also informed that the eventual revocation of the order would not, in any case, apply to vessels at sea in ignorance of it, while the necessary time would be given for the execution of pending contracts.

844

The modification of the Spanish intention in regard to the treatment of sulphur was not officially published in this country, but it is possible that some public announcement upon the subject may have been made in Spain or in Italy, although no information has reached Lord Salisbury to that effect.

I am,
Sir,
Your most obedient,
humble servant,
F. H. VILLIERS.

845 The Secretary,
to the Newcastle Protection
and Indemnity Association,
Newcastle on Tyne.

Malcomson Ex. D 17.

No. 17.

846 DEPARTMENT OF STATE,
WASHINGTON.

August 8, 1898.

L/J

Messrs. SULLIVAN and CROMWELL,
45 Wall Street,
New York City.

GENTLEMEN:

847 Referring to your letter of June 20th last, and to the Department's reply of June 22nd, I enclose herewith for your information a copy of a despatch from our Embassy at Rome, reporting that there was no formal agreement between Spain and Italy regarding the removal of sulphur from the list of articles contraband of war, and mentioning the dates connected with the Matter.

Respectfully yours,
(Sd) J. B. MOORE,
848 Assistant Secretary.

Enclosure:

From Embassy at Rome, No. 251, July 16, 1898.

Malcomson Ex. 18.

849

No. 18.

Copy. No. 251.

EMBASSY OF THE UNITED STATES,
ROME, ITALY,
July 16, 1898.

To Honorable
WILLIAM R. DAY,
Secretary of State,
Washington, D. C. 850

SIR:

Referring to your No. 206, of June 22, last, directing the Ambassador to obtain an official statement of the exact date of the agreement between Spain and Italy exempting sulphur from the list of articles contraband of war, and also the date of the official promulgation of the fact of the agreement in Italy, I beg leave to say that informal inquiries at the Foreign Office eliminated the following information: 851

1st. "The verbal communication made to the Royal Ambassador (at Madrid) concerning the orders given to the commanders of Spanish ships to respect sulphur, was made on April 29, 1898.

2nd. "The *Official* Note confirming the resolution to temporarily suspend, in regard to sulphur, the application of the Royal Decree of April 23, 1898, concerning articles contraband of war, was dated May 31, 1898.

3rd. "The Royal Ambassador at Madrid replied to 852
this note with a note dated June 3, accepting the notification of the declaration and decision of the Spanish Government, expressly reserving judgment, however, as to the principle involved."

There was apparently no "formal agreement" on the subject between the two Governments.

I have the honor to be,
Sir,
Your obedient servant,
LEWIS M. IDDINGS.

853

Malcomson Ex. D. 19.

No. 19.

(Translation.)

GIORNALE DI SICILIA.

No, 115, dated Palermo, Sunday, Monday, 24-25 Apl. 1898. *Is Brimstone Contraband of War?* Rome 24. The Messina Merchants (Boller) approached Mr. Picardi (Parliamentary Deputy for Messina) to urge
854 the Government to co-operate to exclude Brimstone from being considered contraband of war in the Spanish-American conflict. Mr. Picardi has been assured that Venesta (Minister for Foreign Affairs) will telegraph to our Ambassador in Madrid to obtain what is required from the Spanish Authorities. A reply is expected.

Malcomson Ex. D. 20.

855

No. 20.

No 117, dated Palermo, Tuesday, Wednesday, 26-27, Apl. 1898. *Brimstone Contraband of War.* L'Esercito (Newspaper) confirms that Spain includes Brimstone in the list of contraband of war. The Minister of War interested himself in the question, carrying same to the Council of Ministers, who decided to induce Spain to revoke its decision.

856

Malcomson Ex. D. 21.

No. 21.

No. 118, dated Palermo, Wednesday, Thursday, 27-28 Apl. 1898. *Is Brimstone Contraband of War?* Di Scarlia (Deputy) presents the following question, "the undersigned asks to be informed by the Minister of Foreign Affairs if Brimstone has been excluded from the list of contraband of war."

Malcomson Ex. D. 22.

No. 22.

No. 120, dated Palermo, Friday, Saturday, 29–30, April 1898. *The Question of Brimstone.* Rome 29. The Spanish Government has not yet pronounced itself upon the Italian demand to exclude Brimstone from the list of contraband of war. Yesterday our Ambassador renewed his insistance with Sagasta, who promised that a decision should be taken to-day, only the Minister of Marine seems decidedly averse to exclude Brimstone from contraband of war. It is hoped the Italian demand will be conceded.

Malcomson Ex. D23.

No. 23.

No. 121, dated Palermo, Sunday, Monday, 1–2 May, 1898. *Brimstone excluded from contraband of war.* Rome 1. Altho' the official advice has not yet arrived I assure you absolutely, that the Spanish Government has determined to exclude Brimstone from the list of contraband of war. The "Popolo Romana," confirming my information, says that the relative decree is imminent which has been provoked by the insistence of our Ambassador in Madrid, who obtained from Sagasta that he should unite the Council of Ministers in which, notwithstanding the opposition of the Minister of Marine, the opinion prevailed to exclude Brimstone from contraband. This result is due to the action of the Consulta (this is the building in which is situated the Ministry for Foreign Affairs), and the influence of our Ambassador in Madrid.

Rome 1. The "Official Gazette" will publish the decision regarding Brimstone. Meantime the Spanish Government has already ordered the commanders of its ships to allow Brimstone to pass free. Several Sicilian deputies who went to the Consulta received full confirmation of what I telegraph you.

861

Malcomson Ex. D24.

No. 21.

No. 123, dated Palermo, Tuesday, Wednesday, 3-4 May, 1898. *Brimstone excluded from Contraband of war.* Rome 3. The Consulta decided not to publish in the "Official Gazette" the Spanish Goverment's decision regarding the exclusion of Brimstone from contraband of war. But the Minister of the Interior sent a Circular to all the Prefects in Sicily informing
862 them of the Orders relative to the free navigation of cargoes of Brimstone.

Malcomson Ex. D 25

No. 125. No. 25

Thursday—Friday, 5th—6th May, 1898.

863 SULPHUR IS NOT WAR CONTRABAND.

From the Minister of Agriculture, Industry and Commerce, the following telegram has been sent.

"CHAMBER OF COMMERCE, PALERMO: I inform the Chamber of Commerce for the useful information of merchants, that by the decree of April 23rd of the Spanish Government, are considered as contraband of war, arms, projectiles, fuses, powder, sulphur, nitre,
864 dynamite, explosives, uniforms, ornaments, saddles, engines for ships, derricks, screws, boilers, and all that is necessary for the construction, repair and armament of men of war. I would also state that in consequence of our request, the Spanish Goverment has given notice to the commanders of its vessels to let sulphur pass free. (Signed) The Minister, COCCO-ORTU."

Malcomson Ex. D 26

865

No. 26

No. 127.

Saturday—Sunday, 7th—8th May.

THE EXPORTATION OF SULPHUR MAY BE CONTINUED.

The Prefettura also with its communication confirms to us that the exportation of sulphur, notwithstanding the Spanish-American war, may continue. Indeed, the Spanish Government has officially declared in the circular to the commandants of their ships, that sulphur is not to be considered as contraband of war. An official and public declaration is lacking, but there is no doubt that sulphur will pass freely.

866

Styria's Exhibit E—T.

ROYAL DECREE.

867

In accordance with the advice of my Council of Ministers; in the name of my son, King Alfonso XIII., and as Queen Regent of the Kingdom,

I decree as follows:

ART. I.—The state of war existing between Spain and the United States terminates the Treaty of Peace and Friendship of the 28th October, 1795, the Protocol of the 17th January, 1877, and all other agreements, compacts and conventions that have been in force up to the present between the two countries.

868

II.—A term of five days from the date of the publication of the present Royal Decree in the Madrid Gazette is allowed to all United States ships anchored in Spanish ports, during which they are at liberty to depart.

ART. III.—Notwithstanding that Spain is not bound by the Declaration signed in Paris on the 16th April, 1856, as she expressly stated her wish not to adhere to it, my Government, guided by the principles of inter-

869 national law, intends to observe and hereby orders that the following Regulations for maritime law be observed:

(*a.*) A neutral flag covers the enemy's goods, except contraband of war.

(*b.*) Neutral goods, except contraband of war, are not liable to confiscation under the enemy's flag.

(*c.*) A blockade to be binding must be effective; that is to say, maintained with a sufficient
870 force to actually prevent access to the enemy's coast.

ART. IV.—The Spanish Government, while maintaining their right to issue letters of marque, which they expressly reserved in their note of the 16th May, 1857, in reply to the request of France for the adhesion of Spain to the Declaration of Paris relative to Maritime Law, will organize for the present a service of "Auxiliary Cruisers of the Navy," composed of ships
871 of the Spanish Mercantile Navy, which will co-operate with the latter for the purposes of cruising, and which will be subject to the statutes and jurisdiction of the navy.

ART. V.—In order to capture the enemy's ships, to confiscate the enemy's merchandise under their own flag, and contraband of war under any flag, the Royal Navy, auxiliary cruisers, and privateers, if and when the latter are authorized, will exercise the right of visit on the high seas and in the territorial waters of the
872 enemy, in accordance with international law and any regulations which may be published for the purpose.

ART. VI.—Under the denomination contraband of war the following articles are included:

Cannons, machine-guns, mortars, guns, all kinds of arms and fire-arms, bullets, bombs, grenades, fuses, cartridges, matches, powder, sulphur, saltpetre, dynamite, and every kind of explosive, articles of equipment like uniforms, straps, saddles and artillery and cavalry harness, engines for ships and their accessories, shafts, screws, boilers and other articles used in the construc-

tion, repair, and arming of war-ships, and in general all warlike instruments, utensils, tools, and other articles, and whatever may hereafter be determined to be contraband. 873

ART. VII.—Captains, Commanders and officers of non-American vessels or of vessels manned as to one-third by other than American citizens, captured while committing acts of war against Spain, will be treated as pirates, with all the rigor of the law, although provided with a license issued by the Republic of the United States. 874

ART. VIII.—The Minister of State and the Minister of Marine are charged to see the fulfillment of the present Royal Decree and to give the orders necessary for its execution.

MARIA CRISTINA.

Madrid, April 25, 1898.

Styria's Ex. "E."—Proclamation of the Queen Regent of Spain. The original being in Spanish it is omitted and the foregoing English translation thereof is hereby substituted by consent and marked *Styria's* Ex. F 1. 875

Styria's Exhibit F 1.

In the year Eighteen hundred and ninety eight on the 30th of April, in Porto Empedocle.

At reqnest of Messrs. T. F. Florio, of Palermo, who act for a/c and interest of Mr. Alfred Malcomson, of New York, owner of the thousand tons of raw sulphur in bulk loaded on board the Austrian S.S. *Styria* anchored in this port: 876

The undersigned clerk to the Tribunal (civil) and (pena) of Girgenti, where I reside, declared to Mr. A. G. Scopinich, Captain of the above-mentioned steamer, the following:

Petitioner received a letter dated Porto Empedocle, the 27th of April, signed by the intimated, in which he declared, that as he considered a voyage to New

877 York with sulphur dangerous he would discharge the goods in Mr. Zenobio Urso's sheds and in others.

Now, although petitioners have no interest in the goods loaded on the ship which were regularly transferred to Mr. Malcomson, in whose interest they were bought and shipped, but always to defend the rights of the real owner, they with the presents formally claim and protest against the discharge which is threatened, if petitioner should proceed with same without consultation.

878 And for this they hold him responsible for all and whatever damage or trouble, being his fault, that owner of the sulphur might sustain, for whom they hold unprejudiced and with all reserve all rights due to them against all that, which captainmight undertake against law and contract.

And this to be known under all reserve of protests and rights.

The present copy signed by me, clerk to the tribunal, was handed over by me personally in the hands of Cap-
879 tain Scopinich, whom I found on board his steamer, anchored at the extremity of this port at one o'clock, P. M.

(Signed) GIOVANNI MARRIONE.

Styria's Exhibit F2.

In the year 1800 and ninety-eight on the 3d of May,
880 in Palermo.

At request of Mr. Antonio G. Scopinich, Captain of the S. S. *Styria*, of Austrian flag, anchored in Porto Empedocle.

I, the undersigned, clerk to the tribunal of Palermo, where I reside, have declared to Messrs. T. F. Florio of Palermo, with all due respect, that petitioner rejects the protest intimated to him on the 30th of April last, by the clerk Giovanni Marrione.

Petitioner in discharging the goods acted as was his right, and in the best interest of the goods, which is

confirmed by the facts published in the papers and dis- 881
cussed in the Italian Parliament, that sulphur was declared contraband of war by one of the fighting nations.

As per law and agreement, the sulphur was discharged for a/c and risk of shippers, excepted their connection with consignees.

Petitioner in the meantime protests against all delay, expenses and damages which the obstinacy of Messrs. Florio might have as consequence.

Copy of the present act signed by me clerk, has been 882
taken to the above-mentioned address of Messrs. T. & F. Florio, and was handed over into the hands of a clerk employed by above firm, as I could not find a representative of the firm.

(Signed) NICOLO SAROCCA.

Parsons' Ex. F3.

883

(Copy of translation).

Porto Empedocle, 2nd day of May, 1895.

At the request of Messrs. Ferd Baller & Co., of Messina, where they are domiciled, acting for Messrs. Parsons & Petit, of New York, in their interest and that of all concerned, I, the undersigned, usher of the Pretura of Girgenti, where I am domiciled, declared to Captain A. G. Scopinich, of the Austrian steamer *Styria*, anchored in this port as follows: Considering 884
that the said Captain of the 21st of April last, loaded for account and interest of said Messrs. Parsons & Petit, the quantity of 350 T brimstone on board said steamer as p. agreement of charter. Considering that without any reason said Captain took the liberty to discharge and deposit said quantity of sulphur here in Porto Empedocle, which operation caused heavy damages to the protestors, and to all concerned. Considering the above and all or any other reasons of right or fact, the protestors hereby protest against the said

885 Captain A. G. Scopinich, and against his owners, holding them responsible for all damages, charges, interest, loss of profit, averages, etc., which may take place, and therefore will in case of need proceed to apply to the competent Court. A copy of this present act checked and signed by myself I have delivered to Capt. A. G. Scopinich, on board above steamer, at 11 1/4 o'clock.

(Signed) GERLANDO SCHEMBRI, Usher.

886

Parsons' Exhibit F4.

Translation.

MESSINA 5th day of May 1898

At the request of Mr. A G Scopinish, Captn of Austrian steamer *Styria* at present in the port of Porto Empedocle, I, the undersigned, usher of the Civil Tribunal of Messina, where I have my domicile, have declared to the firm of Messrs. Ferd Baller &
887 Co here domiciled, in their quality of representatives of whom it may concern, that the above Captn refused to accept the protest made on 30th April last thro' the usher Giovanni Marrioni. The Captain by discharging the goods has acted according to his right & in the best interest of the merchandize itself. This is confirmed by the fact published in the Papers and discussed in the Italian Parliament, that Brimstone has been declared contraband of war by one of the belligerent powers. By law, & agreement with the
888 Captain, the Brimstone is discharged for account & risk of shippers with due reserve of what may be their relations to the receivers in New York. Meantime the Captain protests against all delays, charges & damages which he may suffer through the obstinacy of said Messrs Ferd Baller & Co, and invites them to reimburse all charges he has incurred for discharging &c. This protest is made to be valid in case of law.

A copy of this present has been handed by me to the said Messrs. Ferd Baller & Co. here domiciled.

(Signed) ANTONIO ALLEGRO, Usher.

Parsons' Ex F5 14/99

Translation.

Porto Empedocle 6th day of May 1898.

At the request of Messrs. Ferd Baller & Co of Messina, acting on behalf of Messrs Parsons & Pettit of New York, in their interest & in the interest of whom it may concern, I, the undersigned Usher of the Pretura of Girgenti, where I am domiciled, declared as follows to Mr A G Scopinich Captn of Austrian S. S. *Styria* anchored in this port. In continuation of the protest dated 2 May through the Usher Gerlando Schembri, His Excellence the Minister of the Interior telegraphed to the prefects of Sicily that the Spanish Government has officially declared that with circular to the commanders of its ships of war it had ordered that Brimstone was not to be considered contraband of war. An official and public declaration is wanting but there can be no doubt that Brimstone will pass freely. Messrs Ferd Baller & Co therefore give notice to said Captn Scopinich that he must reload the Brimstone illegally discharged, not because it was necessary but as a base speculation on his own part & that of his Owners, who tried to get free from carrying the 350 T. Brimstone to New York for the purpose of loading other merchandize at a higher rate of freight in their own interest. Messrs Ferd Baller & Co. therefore in name of whom it may concern protest against said Captain and hold them responsible not only himself but also his owners, for all consequences, damages, charges & interest which have & may occur, & this protest is made to be valid in case of law. A copy of this present act checked, & signed by myself I have delivered to Captn Scopinich of S. S. *Styria* still in this port.

889 890 891 892

(Signed) Mario Travati, Usher.

893

Parsons, Ex. F 6 Feb. 14/99.

Messina, 11th day of May, 1898.

(Translation.)

At the request of Mr. A. G. Scopinich, master of the Austrian SS. *Styria*, I, the undersigned, usher of the Civil Tribunal of Messina, declared to Messrs. Ferd. Baller & Co., here domiciled, in their quality of representatives of whom it may concern. That the Captain refuses the protest intimated to him on 6th
894 inst. because it is not true, or at least not officially, that the Spanish Government has recalled by decree the previous decree declaring brimstone included in contraband of war. Messrs. Baller recognize that a public and official declaration of such recall is wanting, nevertheless they insist that the brimstone be reloaded, when said Captain having already made the discharge has been obliged to provide differently for the interest of the ship. The above said captain refuses the base
895 and slandering insinuations appearing in said protest regarding the reasons for the discharge of the sulphur, and reserves to himself the right to sue Messrs. Baller for all damages, charges and interest deriving from the discharge, which has to be effected from their unreasonable protests. A copy of the present act signed by me was presented in the domicile to Messrs. Ferd. Baller & Co.

(Signed) Antonio Allegra.

896

Parsons, Ex. F 7 Feb. 14/99.

(Translation.)

Austro-Hungarian V. Consulate,
Porto Empedocle, 30 April 1898.

In reply to your telegram of this date, beg to inform you that no act of protest has been made by the Captain of SS. *Styria* for discharging the brimstone only by letter dated 27th inst. he merely informed us that owing to the war he was discharging the brim-

stone at the expense and risk of whom it may concern, 897
and that he deposited the same in the warehouse of Mr. Zenobia Urso under the care of his agent, Mr. William Peirce.

No other official news exists at the Vice-Consulate regarding S. S. *Styria*.

(Signed) I. & R. Vice-Consul,
SALVATORE VINTI.

898

Munroe Ex. F8.

In the year eighteen hundred and ninety-eight on the 2d of May in Porto-Empedocle.

At request of the respectable firm Messrs. L. Amato in Palermo, acting for a/c of Messrs. John Munroe & f. in New York, owners of the 100 tons sulphur in bulk on board of the Austro-Hung. S.S. *Styria* anchored in this port.

I undersigned clerk of the tribunal (civil & penal) 899
in Girgenti where I live, have declared to Mr. Antonio G. Scopinich, captain of the above named steamer, that the petitioners received a letter dated Porto-Empedocle the 27th ulto. *i. e.* the past month of April, signed by the summoned in which he declares that he considers a voyage to New York with a cargo of sulphur as dangerous, and that he would discharge the sulphur in the stores of Mr. Zenobia Urso of Porto Empedocle and others. Although petitioners have no interest in the goods shipped on this boat, being trans- 900
ferred to Messrs. John Munroe & Co. in whose interest the goods were bought and shipped, always to protect the rights of the real owner, they herewith personalty claim and protest against the received advise of the summoned re. the discharge which he announces and if he intends to proceed with same without permission.

And for this they hold him responsible for all damages, not excluding the breaking up of the sulphur and troubles in this matter caused by the summoned to the proprietors of the sulphur in question to whom they

901 reserve unprejudiced all rights which belong to them for their defence against all that, the above captain will undertake contrary to law and contract.

This to inform him under all protest and reserve of rights.

This copy signed by me clerk to the tribunal has been taken by me on board of the above mentioned S/S. *Styria* anchored at the extremity of this port, and handed over personally to the summoned at nine o'clock.

902 (Signed) Giovanni Marrione.

Exhibit F9.

In the year 1800 and ninety-eight, on the 3rd May in Palermo.

At request of Mr. Antonio G. Scopinich as captain of S/S *Styria* under Austro-Hung. flag, moored in 903 the port of Porto Empedocle.

I, undersigned clerk to the civil tribunal of Palermo, where I belong to and stay, declared to Messrs. F. Amato & Co. here in Palermo, piazza Marina No. 27, with all the due respect that the captain declines the protest of which he was given legal notice on the 30th of April last by the clerk to the tribunal Giovanni Marrione. The petitioner, in discharging the cargo, proceeded in his right and to the best interest of the goods. This is confirmed by the fact published in the 904 papers and discussed in the Italian Parliament, that sulphur had been declared contraband of war by one of the fighting nations.

As per law and for convenience of petitioner the sulphur was discharged for a/c and at shipper's risk, taking in consideration the arrangements with consignees.

Petititioner protests in the meantime for all delay, expenses and damages which the obstinacy of the said firm Amato is responsible for, and asks this firm to re-

fund the expenses due to delay of discharge and others, 905
This is valid for any effect of the law,

A copy of this present act, signed by me, undersigned clerk to the tribunal, has been taken by me to the above-mentioned residence of Messrs. J. Amato & Co., and I handed same over to one of the clerks of said firm, as I did not find the representative himself.

(Signed) Nicolo Savoca.

906

Exhibit F10.

In the year 1800 and ninety-eight on the 17th of May, in Messina.

At request of Mr. Antonio Girolamo Scopinich, captain of the Austro Hungarian steamship *Styria* already a(n)chored in Port Empedocle and now on her voyage.

I the undersigned clerk to the tribunal of Messina have notified and herewith given identical copy to 907
Messrs. Emil Fog & Sons of Messina with all due respect which they deserve of the superior recourse of the relative decree of the Praetor of Girgenti with which authority is given to Petitioner to proceed with the sequestration of the sulphur. And this to be known and for every effect of the law. And I have also notified that the sequestration was effected in Porto Empedocle by the Clerk Travali on the 8th inst.

At the same time and at the same request I have summoned above firm to appear before the civil tri- 908
bunal of Girgenti for the sitting on the 21st June at the legal hour and in the usual locality to listen to the (judgement)? of the following questions :

Considering the facts mentioned in the superior recourse.

Considering the decree of which the foregoing is the effected sequestration.

Considering the right of the tribunal of Girgenti to decide on this action.

Considering that as per law and agreement the dis-

909 charging expenses have to be reimbursed by shippers, who have also to pay the store-rent.

Considering everything else.

It may please the tribunal.

To confirm the sequestration as above

Sentence the above firm to pay to petitioner the sum of three thousand five hundred Lire, this being amount of discharging expenses also to pay the store rent in proportion of one per cent. for every year or fraction of years

916 Sentence them to pay expenses of sequestration and present judgement.

Order the sale of the sequestrated sulphur ex *Styria* handing over a sufficient sum to cover expenses so far as to satisfy Petitioner's credit.

Excepted other and more important rights.

For Petitioner advocate Enrico La Loggia will act.

Copy of this act above ricourse and decree signed by me was taken to the address to Emil Foge & Sons handing same to a person of their employ cable of re-

911 ceiving same having not found the representative of the firm.

Styria's Exhibit G

February 14, 1899.

Account sales of brimstone per S. S. *Abbazia* from Sicily as per weight returns Oct. 11, 1898.

912

965 1510/2210 tons Best U 2nd Batons at $20.50 ton	$19,796.32	
Less bkge 1%.....	197.96	
		$19,598.36
486 105/2240 tons Best 3rds D at $18.50 ton.....	8,991.87	
Less bkge 1%.....	89.92	8,901.95
		$28,500.31

913

Malcomson Exhibit H.

February 16/99.

Styria
and or

Account Brimstone per s/s *Albazia* from Sicily to New York.

1898			
Jul. 18	Invoice Cost together with the Bankers Commission		$28,113.88
"	Freight paid.....	2,182.50	
	Marine Insurance Sicily to New York..... .	206.30	
	Weighing at Port of New York.....	116.12	
	Custom House Entry..	4.50	2,509.42
			$30,623.30
Oct. 11	Proceeds of sale of above Brimstone ex S/S *Abbazia* on arrival at New York at market price...		28,500.31
	Difference between Import cost and proceeds of sale–loss....		$2,122.99

914

915

916

917

Parsons, Exhibit I.

February 16, 1899.

Memo. sale 100 tons Real best unmixed 2ds Brimstone per *Abazia*.

Oct. 3/98 901/2240 tons Real best mixed 2ds Brimstone @ $21 3/8 ..... 2,103.35

Charges.

918	Freight @ 1/6 — £36.18/0 @ 4.85	178.96	
	Insurance 2142 @ 1/2 20%...	8.57	
	Bankers Coms. on £408 0/4 @ 1/2% = £20/10 @ 4.85.	9.90	
	Entry at C. H.....	4.50	
	Weighing @ 8c. per ton....	7.88	209.81
			$1,893.54

E. & O. C.

New York, Oct. 7th, 1898.

919 Parsons & Petit,
by W. A. Stopford.

Memo. sale 250 tons Real best unmixed 2ds Brimstono pr. *Abbazia*.

Oct. 6. 240 1962/2240 tons @ $22.00..... 5299.27

Charges.

	Freight on 240 1962/2240 @ 6/		
920	£72.5/7 @ 4.85.....	350.55	
	Insurance on say 5579 @ 1/2 20%....	22.32	
	Bankers Coms. on say £1062 10/0 @ 1/2% £5 6/2 @ 4.85.....	25.74	
	Entry at Custom House.....	4.50	
	Weighing @ 8c. pr. ton	19.28	
	Coms. & Guarantee on 5292/29 2% ..	105.99	528.38
			$4770.89

E. & O. E.

New York, Oct. 7th, 1898.

Parsons & Petit,
by W. A. Stopford.

Invoice value of 250 tons best unmixed 2ds Brim- 921
stone consigned by Messrs. Ferd. Baller & Co. per *Styria* to Parsons & Petit for sale.

Baller cable recd. Apl. 20/98.

250 tons @ 91/.... .....£1137.10/0
Less fgt. @ 6 .... 75.0/0

£1062 10/0
Consils cert..... 10/4

£1063 0/4 922

@ say 4.85 3/4....$5163.60.

Munroe Exhibit J.

STERN & RUSHMORE,
40 Wall Street, New York.

923

December 9th, 1899.

DEAR SIR:

Your favor of the 7th inst. is at hand, in which you ask us to send you Munroe's Exhibit J in the *Styria* matter. We do not find the same, but on the reference before the Master we went into proof, and it was there stipulated that the invoice value of the goods was $2,329; that the shipment was 100 tons of Brimstone, best unmixed seconds; that the weighing charges 924
amounted to $10; and the freight to $145.50; that the Brimstone was sold for $1,997.08, and we will consent to having the Exhibit J consist of the items above stated if the original exhibit cannot be found.

Very truly yours,
STERN & RUSHMORE.

S. H. LYMAN, Esq.,
Clerk District Court of the United States,
Clerk's Office, New York City.

925

Opinion.

In Admiralty. Discharge of Contraband Goods.
Cowen, Wing, Putnam & Burlingham; Sullivan & Cromwell.; Bowers & Sands, and Stern & Rushmore, for the four different Libellants.
Convers & Kirlin, for the *Styria*.

Brown, J.:

926 The above four libels were filed to recover the damages claimed to have been sustained by the libellants, who were the consignees of different lots of brimstone shipped upon the Austrian steamship *Styria* at Port Empedocle, Girgenti, Sicily, in the latter part of April, 1898, and shortly afterwards discharged at the same port, as contraband goods, on the breaking out of the war with Spain. The loading was finished on April 24th and the bills of lading were signed and the ship cleared from the Custom House at Port Empedocle on the same day. On April 20th the Spanish Minster left
927 Washington, and on April 21st our Minister left Madrid. On April 23rd the Queen Regent of Spain issued a decree announcing the existence of war with the United States, which was published in the official papers at Madrid on April 24th, and communicated to the other Powers and made public on or about April 25th. On that day it was published in the newspapers of this country, and presumably in Sicily and England. The declaration of war was made by the United States under an Act passed April 25th, declaring the existence of
928 war since April 21st. On the 22nd the President had proclaimed a blockande of certain Cuban ports.

In Article 6 of the Spanish Proclamation, sulphur was declared contraband of war.

On April 23rd the master received a telegram from Burrell & Sons, the managing agents of the owners of the *Styria* in London, not to sail until further instructions, and on the 25th, a telegram "to discharge whole cargo as quickly as possible." On the 26th, the weather being bad no work was done. On the 27th the discharge was commenced and continued until May 7th, when it

was completed. The ship then cleared and proceeded 929
to Messina and Palermo, from which ports she sailed with a cargo of fruit on May 9th, and arrived at New York on June 3rd. At the commencement of the discharge of the sulphur at Port Empedocle the master gave a notice to the shippers, and to the Austrian Consul at Girgenti, stating that "on finding risky his passage to New York with a sulphur cargo, for facts of war" he discharged the cargo on their account and risk under the bills of lading. He testifies that though directed to discharge by the owners, he did not deem it safe to pro- 930
ceed with a contraband cargo, and would not have sailed with such a cargo without knowing certainly that sulphur was free; that he knew sulphur to be contraband of war; that Spain held it to be so; that war existed; that he heard that a blockade of New York was going on; that his course lay along the Spanish coast; that Spanish men of war were looking for ships there; that he believed this report; that the newspapers in Sicily reported the capture of a sulphur ship; that up to the time he left Sicily there was no public or official declaration that sulphur had been excluded by Spain from the list 931
of contraband goods.

On the other hand it appears from the captain's testimony and other evidence, that almost immediately after the proclamation was published, negotiations were entered upon for the exception of sulphur from contraband goods; that the captain was aware from the public prints of these negotiations, and of the frequent statements in the public prints that the efforts for the exception of sulphur would be successful, and of the announcement before he left Sicily that sulphur would go 932
free. There was not, however, any official confirmation of this statement, though the papers published it as a fact. On April 25th and 26th the *Lord Warwick,* which lay alongside of the *Styria,* sailed for New York with brimstone, and two other vessels from Licata with a similar cargo; all of which passed safely. One of the shippers by the *Styria,* Baller & Company, on May 5th gave notice to the master that "sulphur is no longer contraband of war," though saying in their protest "it is not yet officially confirmed." At Messina, the cap-

933 tain heard read an official announcement by the Prefect that the following telegram had been received by him on May 4th from the Minister of the Interior:

"The Spanish Government has *declared officially in* a circular to the commanders of its own ships, that it has decided that sulphur should not be considered as contraband of war. There is no public or official declaration, but there can be no doubt that sulphur will pass freely."

934 It does not appear that any vessel was stopped by the Spanish on account of sulphur.

Among the exceptions in the bills of lading were the following:

(*a.*) "Restraints of Princes and Rulers or People excepted."

(*b.*) "In case of blockade or interdict of the port of discharge, or if without such blockade or interdict, the master shall consider it unsafe, for any reason, to enter
935 or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense; and on the goods being placed in charge of any mercantile agent or of British consul, and a letter being put into the Post Office, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the master and owners discharged from all responsibility."

(*c.*) "With liberty (in event of steamer putting back
936 to this or into any other port or otherwise being prevented from any acts from commencing or proceeding in the ordinary course of her voyage) to ship or tranship the goods by any other steamer."

(*e.*) "With liberty either before or after proceeding towards the port of discharge to proceed to and stay at any port or place whatsoever."

The above four libels were filed June 4 to June 7, 1898, a few days after the arrival of the ship in New

York. They allege the shipment under the bills of lad- 937
ing, their endorsement to the libellants, the loading of the cargo, the demand for the delivery of the goods at New York, the refusal to deliver and the consequent damage to the amount of the value of the sulphur. Two of the libels allege a conversion of it. The answers were interposed on the following December 1st. In the meantime an agreement by stipulation had been made between the parties, providing that the claimant should forward the brimstone from Empedocle upon the first available steamer to New York, and deliver it to the 938
consignees on the terms for freight as specified in the bills of lading; and that the consignees should pay the agreed freight on delivery; that the goods on arrival should be sold at current market rates, and the proceeds of the goods less charges incurred, be credited on account of the damages, if any, recovered by the libellants; that the respondents should have a lien on the brimstone for the charges against it in Sicily, provided the respondent was justified in relanding and storing it there as was done; if not justified, then the brimstone 939
should be freed from any such charges or expenses except freight. Under this agreement the respondent again caused the brimstone to be loaded and brought to New York by the *Abazzia,* one of its vessels, in August and September, 1898, after paying all the expenses in Sicily, and delivered the sulphur for sale under the agreement, whereupon it was sold, netting about the amount of the invoice prices, and on some of the consignments more than the invoice price, not counting the freight.

The respondent in its answers to the above libels sets 940
up the agreement last named; the payment of the net proceeds to the libellants; that the net proceeds exceeded the invoice price; that the libellants had sustained no damages recoverable against the respondent under the following stipulation in the bill of lading:

'The shipowner is not to be liable * * * in any case for more than the invoiced or declared value of the goods, whichever shall be the least"; and that the discharge and storage of the sulphur at Empedocle was

941 justifiable under the provisions of the bill of lading and the acts and circumstances of war.

The owner of the *Styria* also filed four cross-libels against the above libellants for the recovery of the expenses incurred at Sicily in the discharge and storage of the sulphur upon the same ground pleaded in its answers to the original libels.

1. Though exceptions (*a*) and (*b*) above noted in the bill of lading contemplate circumstances of war and are therefore applicable in the extraordinary circum-
942 stances that arose, still the carrier is not thereby relieved from the duty of acting with reasonable prudence for the interests of all concerned. The master as the agent of all concerned is still bound to a prudent regard for the interests of the cargo, and "must endeavor to hold the balance evenly" between ship and cargo, when their interests conflict. The *Julia Blake,* 107 U. S., 418, 427-8, 431; The *Spartan,* 25 Fed., 44, 56-58; *L'Amerique,* 35 Fed., 844-5; Cargo *ex Argos,* L. R., 5 P. C., 134, 165; Noble *v.* Jenkins (1896), 2 Q. B., 326, 331-2.

943 The sulphur being generally regarded as contraband of war, and also within the express terms of the Spanish proclamation, a voyage through the Mediterranean, past the coast of Spain and through the Straits of Gibraltar would presumably be pecuniarily dangerous to the cargo, even though the vessel, as a neutral, might not be liable to condemnation as prize. In case of seizure, however, the shipowner would suffer from the considerable delay incident to the seizure though she were ultimately released.

944 Except, therefore, for the negotiations immediately entered on for procuring an exception of sulphur from contraband, I have no doubt that it would have been both the right and the duty of the master for the interests of the cargo as well as of the ship, to refuse to sail with this cargo after clearing on April 24th until there was some reasonable assurance of safety. See the *San Roman,* L. R., 3 Adm. & Eccl., 583, where there was a delay of three months. The discharge and storage of the cargo, however, was an act necessarily involving considerable expense to the shipper or consignee; and before imposing such an expense upon the cargo, the

master in my judgment was bound in view of the daily 945
reports of current negotiations and the expectations of the exception of sulphur, to wait a reasonable period for satisfactory assurances in that regard. No doubt any delay entailed some loss upon the ship, and what should be deemed a reasonable period ought to be determined with reference to the circumstances and interests of both. But taking the circumstances altogether, I am of opinion that the commencement of the discharge on the 27th was too hasty and precipitate; and that the master was guided in that matter by the telegram from 946
Burrell & Son, the managing agents in London, rather than by his own judgment on all the circumstances known to him at the time. Had he been left to exercise his own judgment, I do not think, upon the testimony, that he would have discharged the cargo—especially not at the time he did; and that before he left Italy, although there was no formal publication of the exception of sulphur, there were such informal assurances coming from the Spanish Government as left no reasonable apprehension of danger from sailing with a sulphur cargo.

947

I must find, therefore, that the ship was not justified by clauses (*a*) and (*b*) of the bill of lading above quoted in discharging and storing the cargo on account of the shippers, as she did, between April 27th and May 7th; that by the 10th of May there was reasonable assurance that it would be safe to go on with the voyage, and that this was not an unreasonable time for the ship to wait under the facts and circumstances currently known in Sicily at that time. In Noble *v.* Jenkins, *supra*, t' facts were otherwise.

948

2. The defendant also invokes the liberty to tranship under clause (*c*) of the bill of lading above quoted. This is a clause which is no doubt designed for the benefit of the ship alone, in any emergencies that might call for the exercise of the option given. That clause might perhaps have been applicable in the present case, though without advantage in the result to the defendant, since the defendant would under this clause alone stand chargeable with all the expenses of discharge, storage and reloading. It was doubtful how long the vessel might be detained before it could be ascertained and de-

949 termined whether a contraband cargo could be carried with a reasonable prospect of safety or not. The ship may, therefore, have had the option under this clause, in conjunction with clauses (*a*) and (*b*) above referred to, to discharge the cargo immediately and store it, as she did, rather than incur a certain loss by detention of the vessel for a more or less indefinite period while waiting until it was found safe to proceed; and while thus discharging at once, she might leave it to the chances of future events to determine against which interest,
950 whether of ship or cargo, the expenses should be charged. If the result should show that the vessel would have been detained an unreasonable time before she could have safely sailed, then the expense would properly fall on the cargo, because the discharge would have been justified by the danger clauses (*a*) and (*b*); but if on the other hand, it should turn out that the vessel might have safely sailed within a reasonable time, having due reference to the interests of both ship and cargo, then the discharge could not be justified under clause (*b*), but under
951 clause (*c*) alone; and any such transhipment being at her own option and for her own convenience, all the expenses of discharge, storage and reshipment would fall upon the ship, as in any other case of a transfer and reshipment under clause (*c*).

In this case, however, the discharge was stated by the master at the time to be based upon his rights under clauses (*a*) and (*b*) only; and the various clauses of the agreement subsequently made between the parties, under which the cargo was brought forward, seem based
952 upon the same assumption.

3. The stipulation in the bill of lading, that the shipowner "is not to be liable in any case for more than the invoiced or declared value" of the goods, does not mean that the consignees shall pay freight in addition to the loss of the invoice price; but under the agreement with the parties for forwarding the cargo to New York, I think that the consignees are entitled to deduct the freight paid by them from the gross proceeds of the sale of the brimstone, as a part of the expenses of realizing the moneys derived from it.

Decrees may be entered in accordance with the above findings; and if the parties cannot agree as respects the net proceeds and the invoice price, a reference may be taken in each case to adjust the same. 953

April 5/99.

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court Rooms in the City of New York, on the 13th day of April, 1899. 954

Present—Hon. ADDISON BROWN, Judge.

AUSTRO-AMERICANA STEAMSHIP COMPANY

AGAINST 955

3,250 Cantars of Brimstone, owned by JAMES L. MORGAN and others *ex* S. S. "ABBAZIA."

This cause having been heard on the pleadings and proofs of the respective parties, and having been argued by the respective advocates, now on motion of Cowen, Wing, Putnam & Burlingham, proctors for claimants, 956 it is

Ordered, adjudged and decreed that the libel herein be and the same hereby is dismissed with costs.

And it is further ordered, adjudged and decreed that the claimants, James L. Morgan, John M. Goetchius, James L. Morgan, Jr., Henry K. Goetchius and Lancaster Morgan, recover herein against the libellant, the Austro-Americana Steamship Company the sum of $41.09 costs as taxed, and that unless this decree be

957 satisfied or proceedings thereon stayed on appeal within the time and in the manner prescribed by the rules and practice of this Court, the stipulators for costs on the part of the libellant cause the engagements of their stipulation to be performed, or show cause why execution should not issue against their goods, chattels and credits to enforce satisfaction thereof.

ADDISON BROWN.

[Endorsed:]—Final decree filed Nov. 14, 1899.

958

At a Stated Term of the District Court of the United States, for the Southern District of New York, held at the Court Rooms in the Borough of Manhattan, City of New York, on the 13th day of April, 1899.

959 Present—Hon. ADDISON BROWN, Judge.

AUSTRO-AMERICANA STEAMSHIP COMPANY,

Libellant,

AGAINST

960 4,550 Cantars of Brimstone, owned by SCHUYLER L. PARSONS, *ex* S/S "ABBAZIA,"

Claimant.

This cause having been heard on the pleadings and proofs of the respective parties, and having been argued by the respective advocates, and due deliberation being had in th premises, and it appearing to the Court that the claimant has made out a sufficient and valid title to

the brimstone; now on motion of Bowers & Sands, 961
proctors for the claimant, it is now

Ordered, adjudged and decreed, that the libel filed in the cause be dismissed wiht Forty-one 00/100 dollars costs taxed against libellant.

ADDISON BROWN.

[Endorsed:]—Final decree.—Filed Oct. 2, 1899.

At a Stated Term of the District Court of 962
the United States for the Southern District of New York, held at the Court Rooms in the City of New York, on the 6th day of October, 1899.

Present—Hon. ADDISON BROWN, Judge.

AUSTRO-AMERICANA STEAMSHIP COMPANY, 963

vs.

1,500 Tons of Brimstone owned by ALFRED S. MALCOMSON, *ex* Steamship "ABBAZIA."

964

This cause having been heard on the pleadings and proofs of the respective parties and having been argued by the respective advocates, now, on motion of Sullivan & Cromwell, proctors for claimants, it is

Ordered, adjudged and decreed that the libel herein be and the same hereby is dismissed with costs. And it is further

Ordered, adjudged and decreed that the claimant, Alfred S. Malcomson, recover herein against the libel-

965 lants, the Austro-Americana Steamship Company, the sum of $31.85 costs, as taxed, and that unless this decree be satisfied or proceedings thereon stayed on appeal within the time and in the manner prescribed by the rules and practice of this Court, the stipulators for costs on the part of the libellant cause the engagements of their stipulation to be performed or show cause why execution should not issue against their goods, chattels and credits to enforce satisfaction thereof.

ADDISON BROWN.

966 [Endorsed:]—Final decree filed Oct. 6, 1899.

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court Rooms at the City of New York, on the 24th day of October,
967 1899.

Present—Hon. ADDISON BROWN, Justice.

AUSTRO-AMERICANA STEAMSHIP COMPANY,
Plaintiff,

AGAINST

968 100 Tons of Brimstone, owned by JOHN MUNROE & COMPANY, *ex* Steamship "ABBAZIA,"
Defendant.

This cause having been heard on the pleadings, and proof of the respective parties having been argued by the respective advocates,

Now, on motion of Stern & Rushmore, proctors for 969
the claimants, it is

Ordered, adjudged and decreed that the libel herein be and the same is hereby dismissed with costs.

Further ordered, adjudged and decreed that the claimants, John Munroe, Edgar Lockwood, Henry W. Munroe and Frederic de Reiset, recover herein against libellant, the Austro-Americana Steamship Company, the sum of thirty-nine and 19/100 dollars costs as taxed, and that unless this decree be satisfied, or proceedings thereon stayed on appeal within the time and in the 970
manner prescribed by the rules and practice of this Court, the stipulators, for costs on the part of the libellant, cause the engagements of the stipulation to be performed, or show cause why execution should not issue against their goods, chattels and credits to enforce the satisfaction thereof.

Enter.

ADDISON BROWN.

Notice of settlement waived, no objection to form of 971
decree.

CONVERS & KIRLIN.

[Endorsed:]—Final decree filed Oct. 24, 1899.

972

973 At a Stated Term of the District Court of the United States, for the Southern District of New York, held at the Court Rooms in the City of New York, on the 12th day of April, 1899.

Present—Hon. ADDISON BROWN, Judge.

974 JAMES L. MORGAN, JOHN M. GOETCHIUS, JAMES L. MORGAN, Jr., HENRY K. GOETCHIUS and LANCASTER MORGAN

AGAINST

The Steamship "STYRIA," her engines, etc.

975

This cause having been heard on the pleadings and proofs of the respective parties, and having been argued by the respective advocates, now on motion of Cowen, Wing, Putnam & Burlingham, proctors for the libellants, it is

Ordered that the libellants above named recover herein the damages by them sustained by reason of the matters set forth in the libel, and that it be referred to Wm. 976 P. Prentice, Esq., Special Commissioner of this Court hereby appointed to ascertain such damages, and to report to this Court with all convenient speed.

ADDISON BROWN.

[Endorsed:]—Interlocutory decree.—Filed July 3, 1899.

977 At a Stated Term of the District Court of the United States, for the Southern District of New York, held at the Court Rooms in the City of New York, on the 12th day of April, 1899.

Present—Hon. ADDISON BROWN, Judge.

978 JOHN MUNROE, EDGAR LOCKWOOD, HENRY W. MUNROE and FREDERIC DE REISET

AGAINST

The Steamship "STYRIA," her engines, &c.

979 This cause having been heard on the pleadings and proofs of the respective parties, and having been argued by the respective advocates,

Now, on motion of Stern & Rushmore, proctors for the libellants, it is

Ordered, that the libellants above named recover herein the damages by them sustained by reason of the matters set forth in the libel, and that it be referred to Wm. P. Prentice, Esq., a Special Commissioner of this Court hereby appointed to ascertain such damages, and to report to this Court with all convenient speed.

980 ADDISON BROWN.

A copy.

SAMUEL H. LYMAN,
Clerk.

[Endorsed:]—Interlocutory decree.—Filed Oct. 27, 1899.

981 At a Stated Term of the District Court of the United States, for the Southern District of New York, held at the Court Rooms in the City of New York, on the 9th day of August, 1899.

Present—Honorable ADDISON BROWN, Judge.

982 ALFRED S. MALCOMSON

AGAINST

The Steamship "STYRIA," her engines, etc.

983 This cause having been heard on the pleadings and proofs of the respective parties, and having been argued by the respective advocates, now on motion of Sullivan & Cromwell, proctors for the libellants, it is

Ordered, that the libellants above named recover herein the damages by them sustained by reason of the matters set forth in the libel, and that it be referred to William P. Prentice, Esq., a Commissioner of this Court, to ascertain such damages, and to report to this Court with all convenient speed.

ADDISON BROWN.

984 [Endorsed:]—Interlocutory decree.—Filed August 24, 1899.

985 At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court Rooms in the City of New York, on the 11th day of April, 1899.

Present—Hon. Addison Brown, Judge.

Schuyler L. Parsons vs. Steamship "Styria," her tackle, etc.	986

This cause having been heard on the pleadings and proofs of the respective parties, and having been argued by the respective advocates, now on motion of Bowers 987
& Sands, proctors, for the libellants, it is

Ordered that the libellants above named recover herein the damages by them sustained by reason of the matters set forth in the libel, and that it be referred to Wm. P. Prentice, Esq., a Special Commissioner of this Court hereby appointed to ascertain such damages, and to report to this Court with all convenient speed.

Addison Brown.

[Endorsed:]—Interlocutory decree, filed 1899. 988

989 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES L. MORGAN *et al.*

vs.

990 The S. S. "STYRIA."

Before William P. Prentice, Esq., Special Commissioner.

NEW YORK, April 25th, 1899.

Met pursuant to notice.

Present—The COMMISSIONER:

991 APPEARANCES:

Mr. CHARLES C. BURLINGHAM, for the Libellant.
Mr. J. PARKER KIRLIN, for the Claimant.

It is stipulated that the stenographer's fees shall be a taxable disbursement in this proceeding.

MR. BURLINGHAM: I offer in evidence from page 13B, of the testimony, the following stipulation made on the trial.

"It is agreed that the proceeds of sale of the Morgan
992 sulphur was $4,513.46, being 243 tons and 2,174 pounds at $18.50 a ton. Charges for freight $354.98. Weighing $24.40."

MR. KIRLIN: I object to the item of freight on the ground that it was agreed between the parties that the libellant should pay the freight absolutely, and that freight was not included in the charges which were to be deducted from the proceeds of sale under the stipulation pursuant to which the cargo was brought forward. Also that it is immaterial and irrelevant.

THE COMMISSIONER: Decision reserved upon Mr. Kirlin's objection.

It is admitted that the steamship *Styria* arrived in the Port of New York from Italy and Sicilian ports on or about the 3rd day of June, 1898.

ALFRED S. MALCOMSON, a witness called on behalf of the libellant, being duly sworn, testified as follows: 994

EXAMINED by Mr. Burlingham:

Q. What is your business, Mr. Malcomson? A. I am an importer and broker.

Q. In what kinds of merchandise? A. In sulphur and nitrate of soda and various other chemicals.

Q. How long have you been in that business? A. 15 years or more.

Q. What is your firm? A. I am in business for myself—Alfred S. Malcomson & Co.

995

Q. Your place of business? A. 5 Hanover street.

Q. Have you been familiar during the last few years with the market value of sulphur? A. Yes, sir.

Q. You were here, were you, last May and June, 1898, here in New York? A. Yes, sir.

Q. And all through last year you were dealing in sulphur, importing it, were you? A. Yes, sir.

Q. I don't know whether you saw Mr. Morgan's sulphur that was originally shipped on the *Styria* and came forward by the *Abbazia*, did you? A. I did not see it.

996

Q. You had some sulphur on the same ship, did you not? A. Yes, sir.

Q. The sulphur is described in the bill of lading as Licata best thirds; is that a well-known brand or grade? A. That is a grade; that is one of the grades comes to this country.

Q. Licata means the place it comes from? A. The port of shipment; where it is loaded ordinarily.

Q. What was the market value of Sicilian brimstone

997 Alfred S. Malcomson.

best thirds in this port say on June 3rd or therabouts, 1898?

Objected to as immaterial and irrelevant and as concluded by the decision of the Court, which was that the damage should be assessed on the basis of the invoice value.

Decision on the objection is reserved.

998 Q. What was the market value of Licata best thirds on or about June 3rd, 1898?

Same objection. Decision reserved.

A. As I remember there were no thirds here in New York just at that time.

Q. Were they in the vicinity? A. I had some in Philadelphia.

Q. What were the prices current for Licata best
999 thirds then?

Objected to as immaterial and irrelevant. Decision reserved.

A. I sold them at that time in Philadelphia at $30 a ton.

Q. You have not answered the question directly, which was not what you did, but what the current market price, the ruling price for best thirds was about that time? A. $30 in Philadelphia, and there were none in
1000 New York.

By the Commissioner:

Q. Did the price in the New York market vary from that in Philadelphia? A. Well, yes. If you wanted it in New York you would have to pay the freight over, which would be $1.50 more in New York.

By Mr. Burlingham:

Q. It is only the variation in price between New

York and Philadelphia, the freight between the two places? A. That is the only variation.

Q. That is the rule, is it? A. That would be the rule.

Cross-Examination by Mr. Kirlin:

Q. Did you have any thirds on the *Abazzia* yourself? A. Yes.

Q. What time did she arrive here, do you recollect? A. It was early in October, I think. 1002

Q. What was the market value of thirds at that time? A. About $18.50, as I remember.

Q. How much did you get for yours that came on the *Abazzia?* A. I could not tell you whether it was $18.50 or $19.50.

Q. Wasn't it over $20? A. I think it was $18.50. I can refer and refresh my memory. Thirds you asked me about?

Q. Yes. A. I think it was $18.50.

Q. According to your bills of sales you got $20, as I remember it? A. For thirds? 1003

Q. Yes. A. I think the seconds sold for $20.50. I think it was $18.50 for thirds and $20.50 for seconds. It is on record.

Q. Did yours sold from the *Abbazzia* bring the current market rate? A. Yes.

Q. And the price that you realized on your thirds that came by the *Abbazzia* was the market rate at that time, was it? A. Yes.

Q. So that if your memory is wrong about the $18.50, what yours brought is really the correct market value at that time? A. Yes, sir. 1004

Q. What is the demand for sulphur here and where is the chief demand? A. It was all over the country, sir.

Q. Is there a regular market here? A. A Well, it is used by most chemical concerns.

Q. There is no exchange, I suppose? A. No.

Q. How many merchants are there here dealing in sulphur, well-known merchants? A. There are, I suppose, half a dozen, or perhaps more.

Q. Is there a tolerably steady and constant demand

1005 for sulphur here? A. According to the supply and demand, sir. Sometimes there is a great demand for it, and at other times there is not.

Q. What is the demand; how much does it amount to currently throughout the months in the year? A. The quantity that is sold in a year?

Q. Yes. A. Over 100,000 tons sold in a year.

Q. And is the demand about the same all through the
1006 year in the different months of the year? A. No, sir; the prices would vary according to the supply and demand and whether people had covered their wants. A man can buy a twelve months' supply if he wants, to arrive at certain months.

Re-Direct Examination by Mr. Burlingham:

Q. Mr. Malcomson, didn't you sell the sulphur consigned to you that came by the *Abbazzia* to arrive? A. I couldn't tell you as to that at the moment. I think
1007 probably some of it might have been sold just a little before. Some of it was sold on the market at the time.

Q. You feel sure about that without referring to your books? A. I could not tell you at the moment, sir, for I don't take charge of that. I don't give that my whole attention.

By the Commissioner:

Q. Why so great a difference between June and October in the price of sulphur thirds? A. Well, it hap-
1008 pened to be on account of the war at that time.

By Mr. Burlingham:

Q. What was the price, if you remember, in July and August?

Objected to as immaterial and irrelevant and covered by the bill of lading. Decision reserved.

A. It was much lower than it was in June.

Q. Was it higher than it was in October? A. Oh, yes; it was higher than it was in October.

1009

ALFRED W. JENKINS, a witness called on behalf of the libellant, being duly sworn, testified as follows:

EXAMINED by Mr. Burlingham:

Q. What is your business? A. Brokers and importers.

Q. What firm? A. Parsons & Pettit.

Q. And they do a large business in sulphur, do they? 1010
A. Quite a large business.

Q. And have for how long? A. Well, they are alleged to be the oldest firm in the trade; for the last 25 or 30 years that I know of.

Q. How long have you been in the business? A. I have been in it for 21 or 22 years.

Q. And have you in those years imported sulphur from Sicily and Italy? A. We have.

Q. Are you familiar with the market price of sulphur in New York and thereabouts? A. I would say yes.

Q. And were you and do you know what the market 1011
price of sulphur was about the 3rd of June, 1898, here in New York and hereabouts? A. Best thirds you are speaking about?

Q. Yes. A. Yes.

Q. What was the market price for Sicilian brimstone best thirds in and about June 3rd, 1898, in this port and about here?

Objected to as immaterial and irrelevant and covered by the bill of lading. Decision reserved. 1012

A. We had several inquiries for best thirds at that time, and there wasn't anything available at New York. We canvassed the market thoroughly. There was a lot in Philadelphia, and it was intimated to us we could buy it at $30 a long ton.

Q. Is sulphur always sold by the long ton? A. Yes.

Q. Does that mean 2,240 pounds? A. Yes, sir; we made some sales of best unmixed seconds.

1013 Alfred W. Jenkins.

Q. At about that time? A. I won't say; the latter part of May.

Q. Is there any constant relation between best seconds and best thirds in the market price? A. Yes; there was a difference then of about $3 a ton.

Q. Is that a varying difference? A. Yes, it does vary.

Q. To what extent?

1014 All these questions about the market of seconds and thirds are objected to by Mr. Kirlin on the same grounds as before and decision reserved.

THE COMMISSIONER: We will assume that all this inquiry about the market price in June of sulphur is taken subject to objection.

A. I have known them as far apart as $3 and as close together as 50 cents a ton.

1015 Q. Has there been any wider range than that, $3? A. I hardly think so. I think that is the widest.

Q. I suppose seconds ar better quality than thirds? A. Yes; higher grade.

Q. And there were seconds here at that time? A. About that time.

Q. And what was the market price? A. The latter part of May we made a sale I know. We made a sale on May 25th at $33.50 best unmixed seconds, and I know of a sale that was made on June 4th at $35 for best unmixed seconds.

1016 Q. What was the market price of sulphur in October when the *Abbazzia* arrived here with this sulphur that had been originally shipped on the *Styria?* A. I couldn't tell you that at the moment without looking it up.

Q. Did you attempt to sell this sulphur of Mr. Morgan's that came by the *Abbazzia* in October? A. Yes, I did.

Q. It was put in your hands for sale, was it, after the arrival of the vessel? A. I believe it was.

Q. But you didn't sell it, did you? A. No, we didn't sell it. 1017

Cross-Examination by Mr. Kirlin:

Q. Why not; couldn't you find a buyer? A. Well, it was difficult to find a buyer at that time.

Q. You had some sulphur on the same ship, did you not? A. Yes, we did.

Q. Your firm are one of the libellants here? A. Yes, sir. 1018

Q. And so is Mr. Malcomson? A. That is true.

Q. And on sold your own. Did you have any thirds? A. We did not have any thirds.

Q. What did you have? A. Best unmixed seconds.

Q. And you got the market price for them, I suppose? A. We tried to do the best we could on that point at the time we sold it.

Q. And the usual relation between seconds and thirds I suppose then obtained? A. Yes. 1019

By Mr. Burlingham:

Q. How much did you get for your seconds, do you remember? A. I guess it must be in there. I was trying to think what we got for our seconds. We had 350 tons altogether. It was a little over $20 a ton; it seems to me it was around $21 or $21.50. You have our testimony on the subject.

1020

James L. Morgan, Jr., a witness called on behalf of the libellant, being duly sworn, testified as follows:

Examined by Mr. Burlingham:

Q. You are one of the libellants? A. I am.

Q. And this brimstone that was shipped originally on the *Styria* and finally came forward on the *Abbazzia* was what kind? A. Best thirds.

Q. It arrived here about what date on the *Abbazzia*?

1021 James L. Morgan, Jr.

A. I think about the 4th of October; 3rd or 4th, 1898.

Q. Did you sell it? A. I sold it.

Q. To whom? A. To the Martin Kalbfleisch Chemical Company.

Q. Did you put it in the hands of any brokers to sell? A. I did at first and then withdrew it on the advice of counsel.

Q. You mean before the arrival of the vessel? A.

1022 Before the arrival of the vessel.

Q. What did you get for the sulphur?

Objected to as immaterial and irrelevant and answer taken subject to objection.

A. $18.50 a long ton free on board the boat alongside steamer; the vessel does the discharging into the receiving boat.

Q. Was that the market price then? A. That was the market price.

Q. Do you know of any sales previous to that in a

1023 week or two previous of the same? A. No, I do not. I am not a seller of sulphur; only a consumer, so I have not kept myself posted as to general sales excepting as general information would be concerned in the ruling market price. I am one of the few manufacturers and consumers who import direct. This was not bought through any agent.

Q. How is sulphur usually sold here, Mr. Morgan? A. Do you mean by weight?

Q. No; in what way, auction or private sales or how?

1024 A. Private sales entirely excepting auctions in the case of damaged cargoes.

Q. And is it usually sold after the arrival of the vessel or before? A. That depends largely upon the Sicilian price and the temper of the buyer and his judgment. If brimstone has fluctuated, and it does fluctuate in price like every other commodity——

Q. Did you get a price on this brimstone before it arrived, from any purchaser? A. Did I get a price?

Q. Yes. A. No, sir.

Q. You did make an effort to sell it before it arrived

or took preliminary steps, did you? A. I could have sold it if counsel had so advised.

Q. Could you have got any more for it? A. I think I could have sold that brimstone in July and August at $24 to $26 a ton.

Q. Well, the stipulation by which it was brought forward was not signed until August 12th. Could you have sold it after that for such a price? A. No; the stipulation was signed August 12th?

1026

Q. Yes. A. Counsel advised me not to sell the cargo at first and then of course after the stipulation it was suggested to sell the cargo and the matter was put in a broker's hands and then withdrawn.

Q. Let me remind you, Mr. Morgan, that the ship did not sail from Sicily at all until the 4th September, I think, or thereabout. A. She sailed the 4th of September?

Q. Yes. When did you take steps to have it sold by brokers; before or after she sailed? A. Before she arrived; not before she sailed.

1027

Q. Then it was in September, not August, was it not? A. In September, but in August I had the offer for the goods if we could have given reasonable assurance of the time of shipment. Of course that was not obtainable at that time.

Q. And did you apply to my firm to get permission to sell under the stipulation? A. I did.

By Mr. Kirlin:

Q. You mean in July and August? A. There were two applications—not applications particularly, but conferences with counsel as to the proper course to pursue in this matter. The advice of counsel in both instances was not to sell.

1028

By Mr. Burlingham:

Q. Why should there have been a difference between the price after the vessel arrived and the price you would have got if you had sold it before she arrived? A. Well, a number of steamers did not regard the con-

1029 James L. Morgan, Jr.

ditions of the war as preventing them from carrying sulphur as contraband of war and a large quantity was brought here by other vessels and the market was supplied.

Q. And you mean accordingly the price fell? A. Accordingly the price fell, but during the months of May and June, July and August, or perhaps not August, but in May, June and July, the market was bare and the
1030 chemical trade in a body were buying all that they could purchase at a reasonable figure because they did not know what the future would bring forth.

Cross-Examination by Mr. Kirlin:

Q. What is your manufacturing business, Mr Morgan? A. Manufacturing of chemicals. This is used for the manufacture of sulphuric acid.

Q. Did you use this same kind of sulphur in your business? A. Yes, sir; this was imported for consumption; not for sale.

1031 Q. And you sold it on the advice of counsel rather than consume it yourself? A. Yes.

Q. When did you have it in the hands of brokers, do you recollect? A. I think about—that I can't tell. The date of your letter would determine that; about that period.

Q. Were you purchasing any sulphur about that time? A. No, sir.

Q. Where is the Kalbfleisch factory? A. At Bayonne.

1032 Q. Was it in the hands of brokers after the arrival of the ship? A. No, sir.

Q. You sold direct? A. Sold direct.

Q. To Kalbfleisch after the arrival of the ship? A. Yes, after the arrival of the ship. October 7th delivery was made.

Mr. Burlingham: I will put in this portion of the stipulation entered into between the parties on August 12th, which stipulation is on file and was put in evidence on the trial of the case.

James L. Morgan, Jr. 1033

"1. The claimant shall forward the cargo landed *ex Styria* at port Empedocle on the first available steamer from that port to New York, and shall deliver the same to consignees upon the terms and for the freight specified in the original bills of lading, the consignee to receive the same and to pay the agreed freight on right and true delivery; the goods upon arrival to be sold at current market rates and the proceeds, less the charges incurred, to be credited on account of the damages, if any, recovered in these cases by the libellant." 1034

I offer in evidence letter of Cowen, Wing, Putnam & Burlingham to Messrs. Convers & Kirlin, dated September 12th, 1898, and their reply, dated September 13th, 1898.

Also letter of Messrs. Cowen, Wing, Putnam & Burlingham to Messrs. Convers & Kirlin, dated October 3rd, 1898, and their reply dated October 4th.

Objected to as immaterial and irrelevant.
Marked Exhibits 1, 2, 3 and 4. 1035

LIBELLANT RESTS.

NEW YORK, April 27th, 1899.

MR. KIRLIN: I offer Claimant's Exhibit "1," Morgan, being the bill of lading issued to John Sofiod & Company, covering the sulphur in question in this suit.

I offer the stipulation dated August 12th, 1898, marked *Styria's* Exhibit "C." 1036

Mr. Malcomson testified yesterday that his sulphur, best thirds, realized the current market rate. I now offer in connection with that testimony, for the purpose of showing what his sulphur did bring, *Styria's* Exhibit "G," being a statement of the proceeds of sale of the Malcomson sulphur.

I offer the testimony of Robert Hunter, showing that the invoice value of the Morgan sulphur was $4,279. Hunter, page 7.

Now I don't see how the Commissioner can determine

1037 the case without having before him the depositions and exhibits used at the trial. That is so they can be referred to. I therefore offer the testimony and exhibits that were before the Court at the trial.

MR. BURLINGHAM: I object to these depositions and exhibits being put upon the Commissioner, and state that the counsel should refer specifically to the portions that he wants to put in evidence here.

THE COMMISSIONER: Decision on this offer of the testimony is reserved.

1038 MR. BURLINGHAM: For argument, Mr. Commissioner, I claim that I am entitled to the difference between the value of this sulphur as shown by the sale here in New York in October, and the value of the sulphur in this port as it would have been had it arrived when it ought to have arrived.

THE COMMISSIONER: Namely, in June.

MR. BURLINGHAM: In June.

THE COMMISSIONER: And amounting to how much?

MR. BURLINGHAM: I claim the difference between the
1039 value of the sulphur in this port if it had arrived on the 3rd of June, and the proceeds of its sale when it did arrive, in October, 1898, which difference amounts to $3,410.92. It is made up in this way:

250 tons of sulphur, worth in the market on June 3rd, 1898, $30 a ton.....		$7,500.00
Gross proceeds of sale of 243 tons.....	$4,513.46	
Less freight....	$354.98	
Insurance..	45.00	
1040 Weighing..	24.40	
	$424.38	
		$4,089.08
Which makes a difference of		$3,410.92

That leaves my claim $3,410.92, and that is my argument, that that is the measure of damages.

The Commissioner allows one week for the submission of briefs.

UNITED STATES DISTRICT COURT, 1041

SOUTHERN DISTRICT OF NEW YORK.

SCHUYLER S. PARSONS *et al*

vs.

The Steamship "STYRIA," etc.

Before William P. Prentice, Esq., Special Commissioner. 1042

NEW YORK, August 10th, 1899.

Met pursuant to notice.
Present—The COMMISSIONER.

APPEARANCES:

Messrs. BOWERS & SANDS, for the Libellant. 1043
MR. READ, of Counsel.
Messrs. CONVERS & KIRLIN for the Claimant.
MR. KILBRETH, of Counsel.

It is stipulated that the stenographer's fees shall be a taxable cost in the proceeding.

The claimant renews his offer of judgment, made July 25th, 1899.

The libellant agrees that the following statement of damages, based upon the ruling of Judge Brown 1044
in the case of Morgan *v.* The *Styria*, is a correct statement.

Invoice value...			$6,925.00
Proceeds of sale.		$7,402.00	
Freight paid...	$528.00		
Weighing... ..	112.88	640.88	6,761.12
Damages recoverable as above,			$163.88

Counsel for the libellant excepts to the rule of damages fixed by Judge Brown.

1045 Charles J. Kircher.

CHARLES J. KIRCHER, a witness called on behalf of the libellants, being duly sworn, testified as follows:

EXAMINED by Mr. Read:

Q. Mr. Kircher, where do you reside? A. New York City.

Q. What is your business? A. Importing chemicals and brimstone.

1046 Q. You are connected in business with Mr. Malcomson? A. I am.

Q. How long have you been in the brimstone business? A. About twenty years.

Q. Are you familiar with the state of the market in brimstone at different times? A. I am.

Q. Now, about June 1st, 1898, what was the market price in New York of best unmixed seconds?

Objected to as incompetent under the rule fixed by the Court.

1047 Objection sustained. Exception taken.

MR. READ: I offer to show by this witness that the price of best unmixed seconds on or about June 3rd, 1898, in the market in New York, was $35 per ton.

Objected to as incompetent, irrelevant and immaterial.

Objection sustained. Exception taken.

LIBELLANT RESTS.

1048

TESTIMONY CLOSED.

Case stands over to August 17th, 1899, when counsel may submit anything further they desire.

1049

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ALFRED S. MALCOMSON vs. The Steamship "STYRIA," etc.	Before William P. Prentice, Esq., Special Commissioner. 1050

NEW YORK, August 10th, 1899.

Met pursuant to adjournment.

Present—THE COMMISSIONER.

APPEARANCES: 1051

Messrs. CONVERS & KIRLIN, for the Claimant.
Mr. KILBRETH, of Counsel.
Messrs. SULLIVAN & CROMWELL, for the Libellant.
Mr. HILL, of Counsel.

It is stipulated that the stenographer's fees shall be a taxable cost in the proceedings.

By a stipulation between the parties the following is agreed to be a correct statement: 1052

Invioce value of sulphur..... $27,246.00
Proceeds of sale..... $28,500.31
Freight paid..... $2,182.50
Weighing 116.12

This shows upon the basis on which the Commissioner made up his report in the Morgan case, which report the Court confirmed, a sum due the libellant of $1,044.31.

1053 It is also stipulated that the *Styria* arrived at this port on the 3rd of June, 1898.

CHARLES J. KIRCHER, a witness called on behalf of the libellant, being duly sworn, testified as follows:

EXAMINED by Mr. Hill:

1054 Q. Mr. Kircher, where do you reside? A. In New York City.

Q. What is your business? A. Importing chemicals and brimstone.

Q. You are connected with the business of Mr. Malcomson? A. I am.

Q. How long have you been in the brimstone business? A. About twenty years.

Q. Are you familiar with the state of the market in brimstone at different times? A. I am.

Q. You knew of this importation by Mr. Malcomson
1055 by the *Styria*? A. I did.

Q. There were two grades of brimstone in that importation, were not there? A. Yes, sir.

Q. Seconds and thirds? A. Best unmixed seconds and best thirds.

Q. Can you give me the relative quantities of each kind in your shipment? A. We had 1,000 tons best unmixed seconds and 500 tons best thirds.

Q. Now, about June 3rd, 1898, what was the market price in New York of best unmixed seconds?

1056 Objected to as incompetent, immaterial and irrelevant.

THE COMMISSIONER: Under the rule of damages fixed by the decision of the Court I will sustain the objection.

Exception taken by Mr. Hill.

Mr. HILL: I offer to prove by this witness that on June 3rd, and in and about that time for some period, the market price of best unmixed seconds in New York was $35 a ton, and the best thirds was between $30 and $31 a ton.

Charles J. Kircher. 1057

Objected to as immaterial, irrelevant and incompetent.

Objection sustained on the ground previously stated. Exception taken.

Mr. HILL: I offer to show that Mr. Malcomson, the libellant, in consequence of the non-delivery of the sulphur by the *Styria*, was compelled to and did purchase in open market the following quantities of brimstone, partly to fulfill his obligations under contracts previously 1058
made for this particular brimstone by the *Styria*, and partly because of the necessities of his own business, but altogether due to the failure to deliver this *Styria* sulphur, viz:

Best thirds, 500 tons, bought in Philadelphia, at $27 per ton.

Best seconds, 200 tons at $31.00 per ton.
200 tons at $32.50 per ton.
400 tons at $35.00 per ton.
200 tons at $35.00 per ton. 1059

Same objection, ruling and exception.

LIBELLANT RESTS.

TESTIMONY CLOSED.

Case stands over to August 17th, 1899, when counsel may submit anything further they desire.

1060

1061

UNITED STATES DISTRICT COURT,

Southern District of New York.

John Munroe *et als.* vs. 1062 The Steamship "Styria."	Before W. P. Prentice, Esq., Commissioner.

New York, September 7th, 1899.

Met pursuant to adjournment.

Appearances:

1063 Messrs. Stern & Rushmore, for the Libellant.
Mr. Regensberger, of Counsel.
Messrs. Convers & Kirlin, for the Claimant.
Mr. Kilbreth, of Counsel.

It is stipulated that the stenographer's fees shall be a taxable cost in the proceeding.

It is stipulated that if the damages be allowed and the balance is to be determined by the rule set out in the decision of the Court in this proceeding; that the invoice value of the libellant's goods is the sum of
1064 $2,329 that the shipment was of 100 tons of brimstone, best unmixed seconds, by the steamship *Styria* from Sicily; that the weighing charges amounted to the sum of $10; that the amount of freight paid for the shipment upon the *Ahhatjia* was $145.50.

Mr. Regensberger: Subject to the objection of the claimant as irrelevant, incompetent and immaterial, the libellant offers the following items as expenses incurred in connection with this cargo. Subject to the objection it is stipulated that there was a shortage of 2 1284/2240 tons, this shortage repre-

senting a loss of $52.75 at the selling price of $20.50 per ton at which the brimstone was sold. The libellant also offers to show that this lot of brimstone sold through Parsons & Pettit, brokers, for which they charged a commission of $19.97, making the net proceeds of the sale $1,977.31. 1065

Objected to.

The Commissioner rules that under the decision of the Court this evidence is immaterial and irrelevant, and therefore sustains the objection both as to the shortage and as to the proceeds of sale upon the arrival of the cargo by the *Abbatjia*. 1066

Exception taken.

Mr. Regensberger: The libellant offers to show that the expenses in Sicily to which the libellants were put by reason of the action of the master of the *Styria* amounted to $49.71, the items of which are as follows:

Lawyer's fees and charges for drawing up protest and other legal advice....	Frs. 150	1067
To charges, &c., for stamps on documents and for serving papers.....	75	
To cable expenses in Sicily.....	43	
To cable expenses from New York....	38	
Total	Frs. 256	

Frs. 256 at 5.15, total.....$49.71

Same objection, ruling and exception. 1068

It is stipulated that no objection is made as to the form of proof.

The libellant offers to prove that the *Styria* on her voyage arrived on the 3rd day of June, 1898, but without this cargo, which was sent later, and that she would have arrived at least five days earlier but for the time consumed taking off the cargo at Port Empedocles.

Objected to. Objection sustained.

1069 D. J. Vlasto.

D. J. VLASTO, a witness called in behalf of the libellant, being duly sworn, testified as follows:

EXAMINED by Mr. Regensberger:

Q. There is some testimony, Mr. Vlasto, that this brimstone was worth about $35 a ton, best unmixed seconds, on June 3rd, 1898? A. On June 3rd, 1898, it was worth $35. I think that on June 3rd that market
1070 price is very fair.

Q. Mr. Vlasto, you are a brother of Solomon J. Vlasto? A. Yes, sir.

Q. Who acted for Munroe & Company in this shipment? A. Yes, sir.

Q. How long have you been in the brimstone importing business? A. I have been with my brother for six years.

By the Commissioner:

1071 Q. How long have you been in the business; we want your knowledge of the business? A. Since 1886.

By Mr. Regensberger:

Q. Do you know the value of brimstone in June, 1898?

THE COMMISSIONER: In this market, in New York.

A. Yes, sir.

1072 Q. What was the market for best unmixed seconds from June 3rd to June 10th, 1898? A. About $35 to $40.

Q. What was the highest to your knowledge between that period? A. In June I think it was about $40.

Q. The lowest? A. As far as I can remember now I think about $35. Of course in May——

Q. I am not asking you about May. Now, the appreciation in the price was due to what? A. On account of the talk of war and the scarcity of brimstone here on account of shipments being stopped.

By the Commissioner:

Q. Did the price fall after June? A. Yes, sir; we imported after that into Canada.

Q. When did the price begin to fall? A. Towards the end of June, when a steamer arrived at Montreal with a cargo.

The foregoing testimony taken subject to the objection.

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Counsel for libellant calls attention to the fact that the pleadings are different in this case from the others, because here conversion is directly charged.

Counsel for the claimant calls attention to the fact that this case was tried in conjunction with the Morgan, Malcomson and Parsons cases, in which the identical facts were in dispute, and all four cases were covered by the terms of the decision.

1075

Mr. Regensberger: I offer to show that on the arrival of the *Styria* on the 3rd or 4th of June, 1898, we tendered the amount of the freight stipulated in the bill of lading in bills and demanded the goods called for by the bill of lading.

Counsel for claimant objects to this testimony as immaterial, but does not dispute the accuracy of the statement.

Objection sustained. Exception taken.

1076

Mr. Kilbreth: The claimant calls attention to the stipulation entered into on the part of all the shippers, under which the cargo was brought forward from Sicily upon the steamship *Abbatjia* upon condition that the freight should be paid in New York on her arrival.

Mr. Regensberger: I object to this as immaterial and irrelevant, and call attention to the fact that the purpose and intent of the stipulation, which stipulation was formulated after a communication was had between myself personally and the attorneys for the

claimant, upon the theory and with the understanding that no advantage to anyone, and especially the claimant, was to be derived from keeping that brimstone in an Italian port, and that if brought here the proceeds could be used in diminishing the damages if we were right, and affording a relief to all the parties if we were wrong.

Mr. KILBRETH: I object to the construction placed upon the stipulation by Mr. Regensberger.

1078 THE COMMISSIONER: I will admit the stipulation and it will speak for itself.

Adjourned to Friday, September 8th, 1899, at 1.30 o'clock P. M.

Exhibit 1.

ESEK COWEN
1079 HENRY T. WING
HARRINGTON PUTNAM
CHARLES C. BURLINGHAM
EVERETT MASTEN
JAMES FORRESTER

Law Offices of

COWEN, WING, PUTNAM AND BURLINGHAM,

45 William Street.

NEW YORK, September 12th, 1898.

1080 *Styria.*

Messrs. CONVERS & KIRLIN,

DEAR SIRS:

We understand that the *Styria* left Girgenti August 6th and has not been reported as passing Gibraltar. We are informed that probably a better sale of the cargo can be made if it is put in the hands of brokers now for a sale to arrive, and if you will authorize our clients, under the stipulation of August 12th, 1898, to do this, we think it will be to the advantage of all interested.

Very truly yours,

COWEN, WING, PUTNAM & BURLINGHAM,

Exhibit 2.

1081

Cablegrams: "Vasefield, New York."
Codes: Watkins' and Scott's.

CONVERS & KIRLIN.

5 Beekman Street,
NEW YORK, September 13, 1898.

Messrs. COWEN, WING, PUTNAM & BURLINGHAM,
45 William Street, New York.

1082

S/S *Styria.*

DEAR SIRS:

Your favor of yesterday is received.

Under the circumstances, and considering we have forwarded to our clients the stipulation of August 12th, and that they have agreed to its terms, we are not at liberty to depart from the text and consent to a sale of the cargo to arrive, instead of upon arrival, as provided by the first paragraph of the agreement.

As the course you suggest is, to a certain extent, 1083
speculative, we think you will readily perceive why we should be reluctant to follow it, although we are always desirous to consent to any proceeding that will have a tendency to minimise loss to either side.

Regretting our inability to comply with your wishes herein, we remain,

Yours very truly,
CONVERS & KIRLIN.

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Exhibit 3.

Esek Cowen
Henry T. Wing
Harrington Putnam
Charles C. Burlingham
Everett Masten
James Forrester

Law Offices of
Cowen, Wing, Putnam and Burlingham,
45 William Street.

1086 New York, October 4th, 1898.

Musgrave v. S. S. *Styria*.

Messrs. Convers & Kirlin,
Dear Sirs:

Our clients, Messrs. James L. Morgan & Company, have made every effort pursuant to the stipulation entered into herein August 12th, to sell the consignment of Licata brimstone best thirds originally shipped on the S. S. *Styria* and which arrived here in the S. S. 1087 *Abbazia*. The best offer they have been able to obtain is $18.50 per ton from Alfred S. Malcomson, which we understand was the market price upon arrival of the *Abbazia*, for brimstone of this quality. Please let us know at once whether you and your clients have any objections to our selling our consignment to Alfred S. Malcomson at the price stated $18.50 per ton, or taking it ourselves, upon the understanding that $18.50 per ton was the market price on arrival.

Yours very truly,

1088 Cowen, Wing, Putnam & Burlingham,
Proctors for James L. Morgan & Co.

1089

Exhibit 4.

Cablegrams: "Vasefield, New York."
Codes: Watkins' and Scott's.

CONVERS & KIRLIN.

5 Beekman Street,
NEW YORK, October 4, 1898.

Messrs. COWEN, WING, PUTNAM & BURLINGHAM,
45 William Street, New York.

1090

S/S *Styria* (Morgan).

DEAR SIRS:

Your letter of to-day is received.

We must insist, in behalf of our clients, that Messrs. James L. Morgan & Co. strictly fulfill the terms of the stipulation heretofore entered into by them with the owner of this steamer, and dated August 12, 1898.

Where the stipulation is silent, the owner of the *Styria* demands that your clients act strictly within the limit of the law.

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We are not authorized to stipulate as to the market value of the sulphur, in the absence of its sale, according to agreement, nor to waive any of the rights of the owner of the *Styria* in the premises. Your clients must do as the law directs.

Yours very truly,
CONVERS & KIRLIN,
Proctors for S/S *Styria*.

1092

1093 DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

JAMES L. MORGAN, JOHN M. GOETCHIUS, JAMES L. MORGAN, JR., HENRY K. GOETCHIUS and LANCASTER MORGAN

1094

AGAINST

The Steamship "STYRIA," her engines, etc.

To the Honorable ADDISON BROWN, Judge of the United States District Court:

1095 By the interlocutory decree herein, it having been referred to the undersigned as Special Commissioner to ascertain and compute the amount of damages to the libellant and to report the same to the Court with all convenient speed:

I, William P. Prentice, as such Special Commissioner, do respectfully report as follows: That I have been attended by the respective parties, and have taken the evidence offered by them, and all the proceedings had before me are herewith annexed.

1096 The inquiry in this case relates to the damages which the libellant may recover under the decision of this Court and the rules therein adopted for the guidance of the Commissioner, upon 3,250 Sicilian cantars of sulphur shipped by John Sofio & Co., consigned to Brown Brothers & Co. by Bill of Lading dated April 23rd, 1898, signed by Antonio G. Scopinich, who was master of the S. S. *Styria*. This sulphur was of the quality of best "Thirds," and was shown in the evidence taken herein to have been worth $30 per ton, on June 3rd, 1898, in New York, and for some time there-

after, and the amount is otherwise given in the argument of counsel, and also in the deposition of Captain Scoponich, as 250 tons, and therefore would have been of the value, if properly transported, and delivered, of $7,500 less the amount of freight to be paid, which by stipulation entered on the minutes was $354.98. The same stipulation admitted the arrival of the *Styria* in the port of New York from Italy and Sicilian ports on or about the 3rd day of June, 1898. The sulphur, after loading had been discharged from April 27th to May 7th and stored in a warehouse at Empedocle in Sicily, which is the port of the town of Girgenti, where the sulphur was shipped, because of the apprehensions of the master of the vessel and of peremptory instructions received by him from his owners, war having been declared between Spain and the United States, and the rumor prevailing that sulphur would be treated as contraband of war. This action on the part of the ship was held by the Court to be unjustifiable, and the immunity therefor under the bill of lading, under the clauses of the same, referred to by the master and by the claimant was refused, on the ground that the bill of lading was inapplicable to the situation disclosed. The Court has said in relation to it:

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"I must find therefore that the ship was not justified by clauses (*a*) and (*b*) of the bill of lading above quoted, in discharging and storing the cargo on account of the shippers—as she did between April 27th and May 7th; that by the tenth of May there was a reasonable assurance that it would be safe to go on with the voyage, and that this was not an unreasonable time for the ship to wait under the facts and circumstances currently known in Sicily at that time."

1100

The opinion of the Court further states:

"The defendant also invokes the liberty to tranship under clause (C) and the bill of lading above quoted. This is a clause which is no doubt designed for the benefit of the ship alone in any emergencies that may call for the exercise of the option given. * * * In this case, however, the discharge was stated by the master at the time to be based upon his rights under clauses (*a*)

and (*b*) only, and the various clauses of the agreement subsequently made between the parties under which the cargo was brought forward seem based upon the same assumption."

Rights under this clause of the bill of lading are therefore also refused to the ship. There having been an unjustifiable refusal on the part of the master to continue the voyage, which, the evidence taken shows, would have enabled him to land his cargo in New York on or about the third day of June, 1898, and his contract having been broken at its very inception, it would seem that none of the clauses of the bill of lading could be availed of for the benefit of the ship, but the ordinary rule of damages for breach of contract of carriage by the carrier must prevail. It has been frequently held that the carrier is liable not simply on contract, but also in tort, for each item of loss, and that clauses in bills of lading should be construed not as a condition of liability, but according to their natural import and the evident intention of the parties. Thus it was held in Pearse against Quebec S. S. Co. (24 Fed. R., 285). Certainly no agreement between the parties can be presumed to make the bill of lading applicable to any act of conversion, nor to a deliberate refusal to perform. No new contract could be made between the parties by the Court wherein some of the reciprocal obligations of the parties should be disallowed while the limitation of the original contract were applied and enforced. In these respects this case differs greatly from those cited upon the reference of the *Hadji* (18 Fed. R., 459), *Lydian Monarch* (23 Fed. R., 298) and the *Aline* (25 Fed. R., 562), where the losses had occurred within the terms of the bills of lading, the contract of shipment having been performed, but the carrier held for damages incident to it.

This situation was, however, apparently changed in some respects by stipulation entered into between the parties dated August 12th, 1898, referred to in the opinion of the Court, and in evidence on this reference. In consequence the sulphur was reshipped by the *Abazzia*, a vessel belonging to the same owners, and arrived in New York, and was sold in October,

1898—243 tons, and 2,174 lbs. all of the original shipment of 250 tons, brought over realising at $18.50 a ton—the market price in October—the sum of $4,513.-46. The freight charges paid under the stipulation were $354.98, and the charges for weighing $24.40. The parties had agreed that the consignee should pay the freight on delivery, and that the goods should be sold at current market rates, and the proceeds of the goods less charges incurred should be credited on account of the damages, if any, recovered by the libellants. There was no dispute that the charge for weighing, was to be allowed, and the question of the allowance of freight appears to have been decided by the Court as follows: 1105 1106

"The consignees are entitled to deduct the freight paid by them from the gross proceeds of the sale of the brimstone as a part of the expenses of realizing the moneys derived from it."

The shrinkage from 250 tons to 243 tons, 2,174 lbs. is to be accounted for in the first place by a deduction made at the storage warehouse at Empedocle, Sicily, of one per cent. (1%) which the master of the *Abazzia* states he was compelled to leave there as he says, according to the custom of the port, which he states as follows: 1107

(Page 15) "I was obliged to pay storage 1% on the quantity deposited, in kind. The custom of the port is to take it in kind."

And secondly, according to the same witness (page 20 of his deposition), in every transhipment from or into lighters, as was required at that port, there is a loss of one to two per cent.; he says between one and a half and two per cent. of the sulphur—it being somewhat dependent upon the strength of the wind. The sulphur was transferred from the lighter to the steamer in baskets. After the 250 tons had been loaded on the steamship *Styria* it had been unnecessarily unloaded, and then again it had to be loaded upon the *Abazzia*, making a loss of about three (3) per cent. in these two handlings, which, with the one per cent. retained in Sicily, according to the custom of the court, upon the storage 1108

1109 in the warehouse, would account for the loss, and under the decision of this case it would seem that that loss must be borne by the ship. If the carrier were to be held for conversion, independent of the limitation of his liability in the bill of lading to invoice value, then the value would be determined at the port of arrival, and he would be entitled to freight. A different rule of damages, however, appears to be necessary in this case, and one to which many of the facts heretofore set forth are not pertinent. They may become of more
1110 importance on a review of all the questions involved in the present contention. The Court has held that the shipowner

"is not to be liable in any case for more than the invoice or declared value of the goods."

The invoice value of the goods was proven at $4,279 or 22,174 lire (Hunter's deposition, page 7), and

"the consignees are entitled to deduct the freight paid by them from the gross proceeds of the sale of
1111 the brimstone as a part of the expenses of realizing the moneys derived from it, and in addition the cost of weighing, $24.40."

If the freight be deducted as a charge, the libellant's damages would amount to $144.92.

This is made up as follows:

Invoice value....			$4,279.00
Proceeds of sale.		$4,513.46	
Weighing..	$24.40		
Freight..... ...	354.98	379.38	4,134.08
1112			
Balance			$144.92

This sum of $144.92, with interest thereon from the 3rd day of June, 1898, I have computed, and hereby report to the Court to be the damages of the libellant.

All of which is respectfully submitted.

Dated New York, June 29th, 1899.

W. P. PRENTICE,
Commissioner.

[Endorsed:]—Commissioner's Report filed June 30, 1899.

1113

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SCHUYLER L. PARSONS

AGAINST

S.S. "STYRIA," her tackle, etc. 1114

To the Honorable ADDISON BROWN, Judge of the United States District Court:

By the interlocutory decree herein, it having been referred to the undersigned as Commissioner, to ascertain and compute the amount of damages to the libellant and to report the same to the Court with all convenient speed, 1115

I, William P. Prentice, as such Commissioner, do respectfully report as follows: That I have been attended by the respective parties, and have taken the evidence offered by them, and all the proceedings had before me are herewith annexed.

The libellant had sulphur on board the steamship *Styria* in Sicily which should have arrived with that vessel in New York June 3rd, 1898.

It was, however, left by that vessel to come forward some months later, when the libellant paid charges upon 1116
it of weighing, $112.88, and freight, $528.00, making the expenses $640.88.

The invoice value of this shipment was $6,925.00, to which should be added under the rule of the Court in this case the expenses, $640.88, totalling $7,565.88.

The sulphur was sold on arrival and brought $7,402.

Deducting the proceeds of sale from the invoice value and the expenses found as above, and the balance is $163.88.

Evidence of the value of this sulphur, best unmixed

1117 "Seconds" in the New York market on June 3rd, 1898, was, under objection and exception, excluded, as not within the rule of damages established by the Court.

I have therefore computed the sum of One hundred and sixty-three dollars and eighty-eight cents, and hereby report the same to the Court to be the damages of the libellant, with interest from June 3rd, 1898.

All of which is respectfully submitted.

Dated New York, August 21st, 1899.

W. P. PRENTICE,

1118 Comr.

[Endorsed:]—Commissioner's Report, filed Aug. 31, 1899.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

1119

ALFRED S. MALCOMSON

AGAINST

The Steamship "STYRIA," her engines, etc.

1120 To the Honorable ADDISON BROWN, Judge of the United States District Court:

By the interlocutory decree herein, it having been referred to the undersigned as Commissioner, to ascertain and compute the amount of damages to the libellant, and to report the same to the Court with all convenient speed,

I, William P. Prentice, as such Commissioner, do respectfully report as follows, that I have been attended by the respective parties and have taken the evidence of-

fered by them, and all the proceedings had before me 1121
are herewith annexed.

The libellant had on board the steamship *Styria* in Sicily in 1898 one thousand tons best unmixed "Seconds" and five hundred tons best "Thirds" of brimstone.

The *Styria* did not transport this cargo to New York, but arrived in this port June 3rd, 1898.

The sulphur came by a later shipment, on which the libellant paid $2,182.30 freight, and weighing, $116.12. The sulphur was sold in this market on arrival and 1122
brought $27,246.00. The invoice value was $28,500.31.

Under the rule of damages fixed by the decision of the Court evidence was refused of the value of sulphur in this market on June 3rd, 1898, and exception was taken.

The damages of the libellant were as follows, after deducting the freight and weighing expenses from the proceeds of sale:

Proceeds of sale.....		$28,500.31	1123
Freight $2,182.50			
Weighing	116.12	2,298.62	
The balance is.....		$26,201.69	
And deducted from the invoice value		27,246.00	
Shows the loss.....		$1,044.31	

This sum of one thousand and forty-four dollars and 1124
thirty-one cents with interest thereon from the 3rd day of June, 1898, I have computed and hereby report to the Court to be the damages of the libellant.

All of which is respectfully submitted.

Dated New York, August 21, 1899.

W. P. Prentice,
Commissioner.

[Endorsed:]—Commissioner's Report filed August 21, 1899.

1125

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN MUNROE, EDGAR LOCKWOOD, HENRY W. MUNROE and FREDERIC DE REISET,

1126 AGAINST

S. S. "STYRIA," her tackle, &c.

To the Honorable ADDISON BROWN, Judge of the United States District Court:

By the interlocutory decree herein, it having been referred to the undersigned as Commissioner, to ascer-
1127 tain and compute the amount of damages to the libellant, and to report the same to the Court with all convenient speed.

I, William P. Prentice, as such Commissioner, do respectfully report as follows: That I have been attended by the respective parties, and have taken the evidence offered by them, and all the proceedings had before me are herewith annexed.

The libellant had one hundred tons of sulphur on board the steamship *Styria* in Sicily, which should have
1128 arrived with that vessel in New York, June 3rd, 1898.

It was, however, left by that vessel to come forward some months later, when the libellants paid charges upon it of

Weighing	$10.00
Freight	145.00
	$155.00

The invoice value of the shipment was..	$2,329.00	1129
To which should be added, under the rule of the Court in this case, the expenses..	155.00	
	$2,484.90	
The sulphur was sold on arrival and brought	$1,997.08	
Deducting the proceeds of sale from the invoice value, and the expenses found as above, and the balance is.....	$487.02	1130

Evidence of the value of this sulphur, best unmixed seconds, in the New York market, at the time the *Styria* was due, was, under objection and exceptions, excluded, as not within the rule of damages established by the Court. And the same ruling was made as to offers of evidence of shortage and demands made for the goods on the arrival of the *Styria* on the 3rd of June, 1898.

I have therefore computed this sum of four hundred eighty-seven and 2/100 ($487.02) dollars, and hereby report the same to the Court, to be the damages of the libellant, with interest from June 3, 1898. 1131

All of which is respectfully submitted.

Dated New York, September 27th, 1899.

(Sd.) W. P. Prentice,
Commissioner.

[Endorsed:]—Commissioner's Report filed October 9, 1899. 1132

1133 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES L. MORGAN *et al.*,

vs.

1134 The "STYRIA."

The libellants except to the report of the Special Commissioner filed herein June 30th, 1899, on the following grounds:

I.—Said Commissioner reports the damages sustained by the libellants at the sum of $144.92.

1135 II.—Said Commissioner does not report said damages to be at least the sum of $2,986.54.

III.—Said Commissioner adopted an erroneous method of assessing the damages, the true measure of damages being the difference in the value of the sulphur at the time and in the place it should have been delivered, viz.: June 3d, 1898, at New York, and at the time of its actual delivery in October, 1898.

1136 IV.—Said Commissioner erred in holding that the clause in the bill of lading limiting liability to the invoiced or declared value of the goods was applicable to the case.

V.—If said clause does apply, said Commissioner erred in his interpretation of it, the true meaning of the clause being that cargo owners may recover up to, but not beyond, the invoice value of their goods.

Dated June 30th, 1899.

COWEN, WING, PUTNAM & BURLINGHAM,
Proctors for Libellants.

To Messrs. Convers & Kirlin,
Proctors for Claimant. 1137

[Endorsed:]—Libellant's exceptions to Commissioner's Report, filed July 5, 1899.

UNITED STATES DISTRICT COURT,

Southern District of New York. 1138

James L. Morgan *et al.*,
Libellant,

against

The Steamship "Styria," Antonio G. Scopinich,
Claimant. 1139

The claimant excepts to the report of the Commissioner herein for the following reasons:

First.—Because the Commissioner added the freight paid by the libellants to the invoice value of the goods in determining the amount of the ships liability under the bill of lading.

Second.—Because the Commissioner held that freight was a charge in the sense of the stipulation dated August 12th, 1898, in determining the amount of charges to be deducted from the proceeds of sale and in determining the amount to be credited under said stipulation on account of the damages to be recovered by the libellants herein against the steamship. 1140

Third.—Because the Commissioner failed, omitted and refused to hold that the libellants were bound to pay the freight absolutely under the stipulation of August 12th, 1898, and that after such payment the damages of the libellants should be limited to the invoice value

1141 of the goods, less the proceeds of the sale thereof, wholly irrespective of the amount paid by the libellants for freight.

FOURTH.—Because the Commissioner failed, omitted and refused to hold that the libellants were not entitled to recover anything as damages herein.

FIFTH.—Because the Commissioner has found that the libellants were entitled to recover damages herein in the sum of $144.92, instead of finding and holding
1142 that the libellants were not entitled to recover anything.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Claimant.

[Endorsed:]—Claimant's exceptions to Commissioner's report, filed July 5, 1899.

1143 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SCHUYLER L. PARSONS and another

AGAINST

1144 Steamship "STYRIA," her tackle, etc.

The libellants above named except to the report of the Commissioner herein assessing the damages of the libellants as follows:

I.—They except to the said report for the reason that the said Commissioner failed to adopt the true rule of damages in assessing the libellants' damages.

II.—They except to the said report for the reason

that the said Commissioner held the libellants bound by 1145
that clause of the bill of lading limiting the damages to the invoice value of the libellants' brimstone.

III.—They except to the said report for the reason that the said Commissioner refused to allow the libellants the difference between the price actually received for the goods (in mitigation of damages) and the market price thereof on or about June 5, 1898, when the *Styria* arrived.

New York, September 8, 1899.

BOWERS & SANDS, 1146
Proctors for Libellants,
31 Nassau Street,
New York City,
N. Y.

To the Clerk of the United States District Court.

Messrs. CONVERS & KIRLIN,
Proctors for Claimant.

[Endorsed:]—Libellants' exceptions to Commissioner's report, filed September 28, 1899. 1147

1148

1149 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SCHUYLER L. PARSONS,
Libellant,

AGAINST

1150 The Steamship "STYRIA," her engines, etc., SCOPINICH,
Claimant.

The claimant excepts to the report of the Commissioner herein for the following reasons:

FIRST.—Because the Commissioner added the freight paid by the libellant to the invoiced value of the goods
1151 in determining the amount of the ship's liability under the bill of lading.

SECOND.—Because the Commissioner held that freight was a charge in the sense of the stipulation dated August 12th, 1898, in determining the amount of charges to be deducted from the proceeds of sale and in determining the amount to be credited under said stipulation on account of the damages to be recovered by the libellant herein against the steamship.

1152 THIRD.—Because the Commissioner did not hold that the libellants were bound to pay the freight absolutely under the stipulation of August 12th, 1898, and that after such payment the damages of the libellant should be limited to the invoice value of the goods less the proceeds of the sale thereof, wholly irrespective of the amount paid by the libellant for freight.

FOURTH.—Because the Commissioner did not hold that the libellants were not entitled to recover anything as damages herein.

FIFTH.—Because the Commissioner has found that 1153
the libellant is entitled to recover damages herein in the sum of $163.88 instead of finding and holding that the libellant was not entitled to recover anything.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Claimant.

[Endorsed:]—Claimant's exceptions to Commissioner's report, filed September 9, 1899.

1154

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ALFRED S. MALCOMSON

vs. 1155

Steamship "STYRIA," her engines, etc.

LIBELLANT'S EXCEPTIONS.

Alfred S. Malcomson, the libellant, excepts to the report of the Commissioner appointed to assess damages herein upon the following grounds:

1156

I.—That said Commissioner reports the damages sustained by libellant as being only the sum of $1,044.31, with interest from June 3rd, 1898.

II.—That said Commissioner erred in rejecting the testimony offered by the libellant to show the value of the sulphur at the time when it should have reached New York and the special damage sustained by the libellant in consequence of its not arriving.

III.—That said Commissioner erred in holding that

1157 the damages recoverable by libellant are only the difference between the net proceeds of sale of the sulphur and the invoice value of the same.

IV.—That said Commissioner erred in holding that the clause in the bill of lading limiting liability to the invoiced value of the goods was applicable to this cause.

V.—That said Commissioner erred in his interpretation of said clause and in not holding that the true intent and meaning thereof was only to limit the total amount
1158 recoverable by libellant.

SULLIVAN & CROMWELL,
Proctors for Libellant.

[Endorsed:]—Libellant's exceptions to Commissioner's report, filed August 31, 1899.

UNITED STATES DISTRICT COURT,

1159

SOUTHERN DISTRICT OF NEW YORK.

ALFRED S. MALCOMSON,
Libellant,

AGAINST

The Steamship "STYRIA," her engines, etc., SCOPINICH,
1160 Claimant.

The claimant excepts to the report of the Commissioner herein for the following reasons:

FIRST.—Because the Commissioner added the freight paid by the libellant to the invoiced value of the goods in determining the amount of the ship's liability under the bill of lading.

SECOND.—Because the Commissioner held that

freight was a charge in the sense of the stipulation dated August 12th, 1898, in determining the amount of charges to be deducted from the proceeds of sale and in determining the amount to be credited under said stipulation on account of the damages to be recovered by the libellant herein against the steamship. 1161

Third.—Because the Commissioner did not hold that the libellants were bound to pay the freight absolutely under the stipulation of August 12th, 1898, and that after such payment the damages of the libellant should be limited to the invoice value of the goods less the proceeds of the sale thereof, wholly irrespective of the amount paid by the libellant for freight. 1162

Fourth.—Because the Commissioner did not hold that the libellants were not entitled to recover anything as damages herein.

Fifth.—Because the Commissioner has found that the libellant is entitled to recover damages herein in the sum of $1,044.31 instead of finding and holding that the libellant was not entitled to recover anything. 1163

Respectfully submitted,

Convers & Kirlin,

Proctors for Claimant.

[Endorsed:]—Claimant's exceptions to Commissioner's report, filed September 9, 1899.

1164

1165

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOHN MUNROE, EDGAR LOCKWOOD, HENRY W. MUNROE and FREDERICK DE REISET,

Plaintiffs,

1166

AGAINST

The Steamship "STYRIA," her tackle, etc.,

Defendant.

LIBELLANTS' EXCEPTIONS.

1167 John Munroe, Edgar Lockwood, Henry W. Munroe and Frederick de Reiset, the libellants, except to the report of the Commissioner appointed to assess the damages herein upon the following grounds:

FIRST.—That said Commissioner reports the damages sustained by libellants as being only the sum of Four hundred and eighty-seven and 2/100 dollars ($487.02) with interest from June 3rd, 1898.

SECOND.—That said Commissioner erred in rejecting
1168 the testimony offered by the libellants to show the value of the sulphur at the time when it should have reached New York, and the said damage sustained by the libellants in consequence of its arriving.

THIRD.—That said Commissioner erred in holding that the damages recoverable by libellants are only the difference between the net proceeds of sale of the sulphur and the invoice value of the same.

FOURTH.—That said Commissioner erred in holding that the clause in the bill of lading limiting liability to

the invoice value of the goods, was applicable to this cause. 1169

Fifth.—That said Commissioner erred in his interpretation of said clause, in not holding that the true intent and meaning thereof was only to limit the total amount recoverable by libellants.

Dated New York, October 6th, 1899.

Stern & Rushmore,
Procs. for Libellants.

1170

[Endorsed:]—Libellants' Exceptions to Commissioner's report, filed October 9, 1899.

UNITED STATES DISTRICT COURT,

Southern District of New York.

1171

John Munroe *et al.*,
Libellants,

against

The Steamship "Styria," Antonio G. Scopinich,
Claimant.

1172

The claimant excepts to the report of the Commissioner herein for the following reasons:

First.—Because the Commissioner added the freight paid by the libellant to the invoiced value of the goods in determining the amount of the ship's liability under the bill of lading.

Second.—Because the Commissioner held that freight was a charge in the sense of the stipulation dated August 12th, 1898, in determining the amount of

1173 charges to be deducted from the proceeds of sale and in determining the amount to be credited under said stipulation on account of the damages to be recovered by the libellant herein against the steamship.

THIRD.—Because the Commissioner did not hold that the libellants were bound to pay the freight absolutely under the stipulation of August 12th, 1898, and that after such payment, the damages of the libellants should be limited to the invoice value of the goods less
1174 the proceeds of the sale thereof, wholly irrespective of the amount paid by the libellants for freight.

FOURTH.—Because the Commissioner did not hold that the libellants were not entitled to recover anything as damages herein.

FIFTH.—Because the Commissioner has found that the libellants are entitled to recover damages herein in the sum of $487.02 instead of finding and holding that the libellants were not entitled to recover anything.

1175 New York, Oct. 11, 1899.

Respectfully submitted,
CONVERS & KIRLIN,
Proctors for Claimant.

[Endorsed:]—Claimant's Exceptions to Commissioner's report, filed Oct. 11, 1899.

1176

OPINION ON EXCEPTIONS TO COMMISSIONER'S REPORT. 1177

BROWN, J.:

By the contract of the bill of lading the invoice value is the basis of settlement of any loss or damage; and a construction seems to me impossible and in fact absurd that would call for the same payment on a partial loss as upon a complete destruction of the goods. Hence the special agreement made pending the action further limits recovery.

1178 No freight was due except upon delivery at New York. Clause 2 of the stipulation recognized the freight as a lien incurred and charged upon the goods by the transportation. It was immaterial whether this lien for freight was paid before or after the sale. If not paid before sale it must have been paid *out of the proceeds* of sale, and if paid by the consignee before sale, it was paid as a lien or charge incurred upon the goods, in accordance with both clauses of the stipulation and hence to be deducted from the amount of proceeds of sale to be credited to the claimant against 1179 the whole damages, *i. e.*, the invoice value as limited by the B/L which was adopted in the stipulation.

The *Hadji*, 18 F. R., 489; affd. 20 F. R., 875; approved in.
The *Lydian Monarch*, 23 F. R., 298, 300.

There was no conversion of the goods; only a mistaken theory of the contract rights and duties. It was the owner's duty to transport the goods and the consignees to pay the freight and that was ultimately done 1180 by each.

July 7, 1899.

Commissioner's Report affirmed.

1181

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court Rooms, Borough of Manhattan, City of New York, on the 17th day of July, 1899.

Present—Hon. ADDISON BROWN, Judge.

1182

JAMES L. MORGAN, JOHN M. GOETCHIUS, JAMES L. MORGAN, Jr., HENRY K. GOETCHIUS and LANCASTER MORGAN,

AGAINST

The Steamship "STYRIA," her engines, etc.

1183

The report of the Commissioner to whom it was referred to ascertain the damages herein having been filed wherefrom it appears that said damages amount to $144.92, and exceptions to said report having been filed by both parties hereto, and said exceptions having been overruled after argument now it is

Ordered that said report be and the same hereby is in all respects confirmed.

1184 And it is ordered, adjudged and decreed that the libellants above named recover herein the sum of $144.92 as damages, and the further sum of $9.78 as interest thereon from the 3d day of June, 1898, and the further sum of $125.78 costs as taxed, making in all the sum of $280 48/100 for which sum the steamship *Styria*, her engines, etc., are hereby condemned.

And it is further ordered that unless this decree be satisfied or proceedings thereon be stayed on appeal within the time and in the manner prescribed by the rules and practice of this Court, the stipulators for

costs and value on the part of the claimant cause the 1185
engagements of their stipulations to be performed or show cause why execution should not issue against their goods, lands and credits to satisfy the same.

ADDISON BROWN.

[Endorsed:]—Final decree—filed August 5, 1899.

At a Stated Term of the District Court of the United States, for the Southern District of New York, held at the Court Rooms in the Borough of Manhattan, City of New York, on the 26th day of September, 1899. 1186

Present—Hon. ADDISON BROWN, Judge.

SCHUYLER L. PARSONS,
Libellant,

AGAINST

The Steamship "STYRIA," her tackle, etc.,
Claimant. 1187

Upon reading and filing the report of William P. Prentice, Esq., the Commissioner to whom it was referred by order of this Court to ascertain and compute the amount of damages to the libellant herein, which report was filed with the Clerk of this Court, wherefrom it appears that said damages amounted to the sum of One hundred and sixty-three and 88/100 dollars ($163.88) on the 3rd day of June, 1898, and upon reading and filing the exceptions of both parties to said report, and upon all the pleadings and proceedings herein, and after hearing counsel in favor of said exceptions, it is 1188

1189 Ordered that the said exceptions filed by both parties be and the same hereby are in all respects overruled.

And it is further ordered that the said report be and the same hereby is in all respects confirmed.

And it is further ordered, adjudged and decreed that the libellant above named recover herein the sum of One hundred and sixty-three and 88/100 dollars ($163.88) as damages, and the further sum of Twelve 94/100 dollars ($12.94) as interest thereon from the 3rd day of June, 1898, and the further sum of Fifty-eight 54/100
1190 dollars ($58.54) taxed as costs herein, making in all the total sum of Two hundred thirty-five 36/100 dollars ($235.36), for which sum the steamship *Styria*, her tackle, etc., are hereby condemned.

And it is further ordered that, unless this decree be satisfied and all proceedings thereon be stayed on appeal within the time and in the manner prescribed by the rules and practice of this Court, the stipulators for costs and value on the part of the claimant cause the engagements of their stipulations to be performed or show
1191 cause why execution should not issue against their goods, lands and credits to satisfy the same.

ADDISON BROWN.

Approved as to form.

CONVERS & KIRLIN,
Proctors for Claimant.

[Endorsed:]—Final decree, filed Oct. 4, 1899.

1192

At a Stated Term of the District Court of the United States, Southern District of New York, held at the Court Rooms in the Borough of Manhattan, City of New York, on the 17th day of July, 1899. 1193

Present—Hon. Addison Brown, Judge.

Alfred S. Malcomson

1194

against

S.S. "Styria," her engines, etc.

The report of the Commissioner to whom it was referred to ascertain the damages herein having been filed, wherefrom it appears that said damages amount to the sum of $1,044.31, and exceptions to said report having been filed by both parties herein, and said exceptions having been overruled after argument, it is now 1195

Ordered, that said report be, and the same is hereby in all respects confirmed, and it is

Ordered, adjudged and decreed that libellant above named recover herein the sum of $1,044.31, as damages, and the further sum of $82.50, as interest thereon from the third day of June, 1898, and the further sum of $59.30, being the costs as taxed, making in all the sum of $1,186.11, for which sum the SS. *Styria,* her engines, etc., are hereby condemned. 1196

And it is further ordered, that unless this decree be satisfied, or proceedings thereon be stayed on appeal within the time, and in the manner prescribed by the rules and practice of this Court, the stipulators for costs and value on the part of the claimant cause the engagements of their stipulations to be performed, or show cause why execution should not issue against their goods, lands and credits to satisfy the same.

Dated Oct. 5, 1899.

Addison Brown.

[Endorsed:]—Final decree, filed October 9, 1899.

1197 At a Stated Term of the District Court of the United States, for the Southern District of New York, held at the Court House, Borough of Manhattan, City of New York, on the 27th day of October, 1899.

Present—Hon. ADDISON BROWN,
Justice.

1198 JOHN MUNROE, EDGAR LOCKWOOD, HENRY W. MUNROE and FREDERICK DE REISET,

Plaintiffs,

AGAINST

The Steamship "STYRIA," her tackle, etc.,

1199 Defendant.

The report of the Comissioner to whom it was referred to ascertain the damages herein, having been filed, wherefrom it appears that the said damages amount to Four hundred and eighty-seven and 2/100 dollars ($487.02) with interest from the 3rd day of June, 1898; and exceptions to said report having been filed by both parties hereto; and said exceptions having
1200 been overruled upon argument,

Now, it is ordered, that the said report be, and the same is hereby in all repects confirmed; and

It is ordered, adjudged and decreed that the libellants above named recover herein the sum of Four hundred and eighty-seven and 2/100 dollars ($487.02) as damages; and the further sum of Thirty-nine and 20/100 dollars ($39.20), as interest thereon from the 3rd day of June, 1898; and the further sum of thirty-seven and 77/100 dollars ($37.77), costs as taxed, making in all the sum of Five hundred and sixty-three and

99/100 dollars ($563.99), for which the steamship 1201
Styria, her tackle, etc., are hereby condemned; and

It is further ordered, that unless this decree be satisfied, or proceedings therein be stayed on appeal, within the time, and in the manner prescribed by the rules and practice of this Court, the stipulators for costs and value on the part of the claimant, cause the engagements of their stipulations to be performed, or show cause why execution should not issue against their goods, lands and credits to satisfy the same.

Enter,

1202

ADDISON BROWN.

Notice of settlement waived. No objection to form of decree.

CONVERS & KIRLIN.

[Endorsed:]—Final decree.—Filed October 27, 1899.

1203

1204

1205

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

AUSTRO-AMERICANA STEAMSHIP COMPANY

AGAINST

1206 3250 Cantars of Brimstone owned by JAMES L. MORGAN *et al., ex* S. S. "ABBAZIA."

SIRS:

Please take notice that the libellant appeals to the United States Circuit Court of Appeals for the Second Circuit, from the final decree entered in the above entitled cause in this Court in favor of the claimant, on
1207 or about the 12th day of April, 1899.

Yours, &c.,

CONVERS & KIRLIN,
Proctors for Libellant.

To SAMUEL H. LYMAN, Esq.,
Clerk.

Messrs. COWEN, WING, PUTNAM & BURLINGHAM,
Proctors for Claimant.

Dated New York, April 22nd, 1899.

1208 [Endorsed:]—Libellants' notice of appeal.—Filed April 22, 1899.

UNITED STATES DISTRICT COURT, 1209

SOUTHERN DISTRICT OF NEW YORK.

AUSTRO-AMERICANA STEAMSHIP CO.,
Libellant,

AGAINST

4550 Cantars of Brimstone owned by SCHUYLER L. PARSONS, *ex* S. S. "ABBAZIA." 1210

SIRS:

Please take notice that the libellant herein appeals to the United States Circuit Court of Appeals for the Second Circuit, from the final decree entered in the above entitled cause on or about October 4th, 1899. 1211

Yours, &c.,
CONVERS & KIRLIN,
Proctors for Libellant.

To SAMUEL H. LYMAN, Esq.,
Clerk.
Messrs. BOWERS & SANDS,
Proctors for Claimant.

Dated New York, October 11th, 1899.

[Endorsed:]—Libellant's notice of appeal.—Filed October 11, 1899. 1212

1213

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

AUSTRO-AMERICANA STEAMSHIP CO.,
Libellant,

AGAINST

1214

1500 Tons of Brimstone, *ex* S. S. "ABBAZIA."

SIRS:

Please take notice that the libellant herein appeals to the United States Circuit Court of Appeals for the Second Circuit, from the final decree entered in the
1215 above entitled cause on or about October 6th, 1899.

Yours, &c.,
CONVERS & KIRLIN,
Proctors for Libellant.

To SAMUEL H. LYMAN, Esq.,
Clerk.

Messrs. SULLIVAN & CROMWELL,
Proctors for Claimant.

Dated New York, October , 1899.

1216 [Endorsed:]—Libellant's notice of appeal.—Filed October 12, 1899.

1217

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

AUSTRO-AMERICANA STEAMSHIP CO.,
Libellant,

AGAINST

1218

100 tons of Brimstone, owned by JOHN MUNROE *et al.*, *ex* S.S. "ABBAZIA."

SIRS:

Please take notice that the libellant herein appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered in the above entitled cause, on or about Oct. 24, 1899.

1219

Yours, &c.,
CONVERS & KIRLIN,
Proctors for Libellant.

To SAMUEL H. LYMAN, Esq.,
Clerk.
Messrs. STERN & RUSHMORE,
Proctors for Claimant.
Dated New York, October 20, 1899.

[Endorsed:]—Libellant's notice of appeal, filed October 30, 1899.

1220

1221

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

JAMES L. MORGAN, JOHN M. GOETCHIUS, JAMES L. MORGAN, Jr., HENRY L. GOETCHIUS and LANCASTER MORGAN

1222

AGAINST

The Steamship "STYRIA," her engines, etc.

Take notice that the libellants herein appeal from that portion of the final decree entered herein on the 17th day of July, 1899, which awards but $144.92 as
1223 damages, to the United States Circuit Court of Appeals for the Second Circuit.

COWEN, WING, PUTNAM & BURLINGHAM,
Proctors for Libellants,
Office and Post Office Address,
45 William Street,
Borough of Manhattan,
New York City,
N. Y.

To SAMUEL H. LYMAN, Esq.,
1224 Clerk.
Messrs. CONVERS & KIRLIN,
Proctors for Claimant.

[Endorsed:]—Libellants' notice of appeal, filed July 28, 1899.

UNITED STATES DISTRICT COURT, 1225

SOUTHERN DISTRICT OF NEW YORK.

SCHUYLER L. PARSONS,
Libellant,

AGAINST

The Steamship "STYRIA," her tackle, etc., 1226
Claimant.

SIRS:

Please take notice that the libellant herein appeals to the United States Circuit Court of Appeals for the Second Judicial District from so much of the final decree entered in the above entitled cause on the 4th day of October, 1899, as adjudges the damages at $176.82 1227 instead of the value of the brimstone on or about June 5, 1898, at the port of New York, after deducting the proceeds of the goods applicable under the stipulation of August 12, 1898, in mitigation of damages.

Dated New York, October 11, 1899.

Yours, &c.,
BOWERS & SANDS,
Proctors for Libellant,
31 Nassau Street,
Borough of Manhattan, 1228
New York City,
N. Y.

To SAMUEL H. LYMAN, Esq.,
Clerk.

Messrs. CONVERS & KIRLIN,
Proctors for Claimant.

[Endorsed:]—Libellant's notice of appeal, filed Oct. 12, 1899.

1229

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ALFRED S. MALCOMSON

AGAINST

1230 The Steamship "STYRIA," her engines, etc.

GENTLEMEN:

Please take notice that the libellant herein hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from so much of the final decree entered in the above entitled cause on October 5th, 1899, as limits the damages recoverable by the libellant herein
1231 to the sum of $1,044.81.

Dated New York, October 12, 1899.

Yours, &c.,

SULLIVAN & CROMWELL,

Proctors for Libellant.

To SAMUEL H. LYMAN, Esq.,
Clerk.

Messrs. CONVERS & KIRLIN,
Proctors for Libellor.

1232 [Endorsed:]—Libellant's notice of appeal, filed Oct. 12, 1899.

UNITED STATES DISTRICT COURT, 1233

SOUTHERN DISTRICT OF NEW YORK.

JOHN MUNROE, EDGAR LOCKWOOD, HENRY W. MUNROE and FREDERIC DE REISET,

AGAINST 1234

Steamship "STYRIA," her engines, etc.

SIRS:

Please take notice that the libellants herein hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, from so much of the final decree entered in the above entitled cause on the 27th 1235 day of October, 1899, as limits the damages recoverable by the libellants herein to the sum of five hundred and sixty-three and 99/100 dollars ($563.99).

Dated New York, October 31st, 1899.

Yours, &c.,

STERN & RUSHMORE,

Proctors for Libellants,

40 Wall Street, N. Y.

To SAMUEL H. LYMAN,

Clerk. 1236

CONVERS & KIRLIN,

Proctors for Claimant.

[Endorsed:]—Libellants' notice of appeal, filed Nov. 1, 1899.

1237

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES L. MORGAN *et al.*,
Libellants,

AGAINST

1238

The Steamship "STYRIA," SCOPINICH,
Claimant.

SIRS:

You will please take notice that the claimant herein appeals from the final decree entered herein on the 17th of July, 1899, to the United States Circuit Court
1239 of Appeals for the Second Circuit.

Dated New York, July 28th, 1899.

Yours, &c.,
CONVERS & KIRLIN,
Proctors for Claimant.

To SAMUEL H. LYMAN, Esq.,
Clerk.

Messrs. COWEN, WING, PUTNAM & BURLINGHAM,
Proctors for Libellants.

1240 [Endorsed:]—Claimant's notice of appeal, filed July 29, 1899.

UNITED STATES DISTRICT COURT, 1241

SOUTHERN DISTRICT OF NEW YORK.

SCHUYLER L. PARSONS,
Libellant,

AGAINST

The Steamship "STYRIA," ANTONIO G. SCOPINICH, 1242
Claimant.

SIRS:

Please take notice that the claimant herein appeals to the United States Circuit Court of Appeals for the Second Circuit, from the final decree entered in the above entitled cause on or about the 4th day of October, 1243
1899.

Dated New York, October 9th, 1899.

Yours, &c.,
CONVERS & KIRLIN,
Proctors for Claimant.

To SAMUEL H. LYMAN, Esq.,
Clerk.
Messrs. BOWERS & SANDS,
Proctors for Libellant.

[Endorsed:]—Claimant's notice of appeal, filed October 10, 1899. 1244

1245 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ALFRED S. MALCOMSON,
Libellant,

AGAINST

1246 The Steamship "STYRIA," ANTONIO G. SCOPINICH,
Claimant.

SIRS:

Please take notice that the claimant herein appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered in the
1247 above entitled cause on the 5th day of October, 1899.

Yours, &c.,
CONVERS & KIRLIN,
Proctors for Claimant.

To SAMUEL H. LYMAN, Esq.,
Clerk.
Messrs. SULLIVAN & CROMWELL,
Proctors for Libellant.
Dated New York, Oct. 11, 1899.

1248 [Endorsed:]—Claimant's notice of appeal, filed 1899.

UNITED STATES DISTRICT COURT, 1249

SOUTHERN DISTRICT OF NEW YORK.

JOHN MUNROE *et al.*,
Libellants,

AGAINST

The Steamship "STYRIA," ANTONIO G. SCOPINICH, 1250
Claimant.

SIRS:

Please take notice that the claimant herein appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered in the above entitled cause on or about , 1899. 1251

Yours, &c.,
CONVERS & KIRLIN,
Proctors for Claimant.

To SAMUEL H. LYMAN, Esq.,
Clerk.
Messrs. STERN & RUSHMORE,
Proctors for Libellant.
Dated New York, October , 1899.

[Endorsed:]—Claimant's notice of appeal, filed Oct. 3d, 1899. 1252

1253 UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

AUSTRO-AMERICANA STEAMSHIP COMPANY,

Libellant,

1254

AGAINST

3,250 Cantars of Brimstone owned by JAMES L. MORGAN *et al.*, *ex* S.S. "ABBAZIA."

The libellant-appellant herein assigns error in the final decision of the United States District Court for
1255 the Southern District of New York herein as follows:

FIRST.—For that the Court refused to find that the *Styria* was justified in discharging the cargo as and when she did at Port Empedocle, and that accordingly under the stipulation between the parties entered into August 12th, 1898, the libellant had a lien upon and was entitled to recover from the claimant's consignment *ex Abbazia*, the damages, charges and expenses set forth in the libel.

1256 SECOND.—For that the Court did not hold that the ship was exonerated from bringing the sulphur forward on her then voyage by the existence of a state of war and the liability to capture, irrespective of the clauses in the bill of lading.

THIRD.—For that the Court held that the ship was bound to wait until May 10th before exercising the privilege contained in the bill of lading of landing and storing the sulphur at Port Empedocle, and that if she had so waited, she could have safely proceeded on her voyage with the sulphur.

FOURTH.—For that the Court held that the forwarding of the sulphur by the shipowners, on the steamship *Abbazia* did not, under the trans-shipment clause in the bill of lading relieve them from liability for damages caused by the failure to carry the sulphur forward on the *Styria*. 1257

FIFTH.—For that the Court omitted and refused to find that the libellant was entitled to recover from the claimants' consignment of sulphur *ex Abbazia*, in consideration of their having carried the said sulphur on board the *Abbazia* and having paid certain charges, liens and expenses thereon at Port Empedocle, the rate of freight stipulated for in the original bills of lading, together with the expenses and charges on the said sulphur paid by the libellant, and which the claimants would have had to pay if they had forwarded the sulphur themselves. 1258

SIXTH.—For that the Court dismissed the libel herein.

CONVERS & KIRLIN,
Proctors for Libellant. 1259

[Endorsed:]—Libellant's assignment of errors, filed Oct. 12, 1899.

1260

1261

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

AUSTRO-AMERICANA STEAMSHIP COMPANY,

Libellant,

1262

AGAINST

4,550 Cantars of Brimstone, owned by SCHUYLER L. PARSONS, *ex* S.S. "ABBAZIA."

The libellant-appellant herein assigns error in the final decision of the United States District Court for
1263 the Southern District of New York herein as follows:

FIRST.—For that the Court refused to find that the *Styria* was justified in discharging the cargo as and when she did at Port Empedocle, and that accordingly under the stipulation between the parties entered into August 12th, 1898, the libellant had a lien upon and was entitled to recover from the claimant's consignment *ex Abbazia,* the damages, charges and expenses set forth in the libel.

1264 SECOND.—For that the Court did not hold that the ship was exonerated from bringing the sulphur forward on her then voyage by the existence of a state of war and the liability to capture, irrespective of the clauses in the bill of lading.

THIRD.—For that the Court held that the ship was bound to wait until May 10th before exercising the privilege contained in the bill of lading of landing and stoing the sulphur at Port Empedocle, and that if she had so waited, she could have safely proceeded on her voyage with the sulphur.

Fourth.—For that the Court held that the forwarding of the sulphur by the shipowners, on the steamship *Abbazia* did not, under the transshipment clause in the bill of lading relieve them from liability for damages caused by the failure to carry the sulphur forward on the *Styria*. 1265

Fifth.—For that the Court omitted and refused to find that the libellant was entitled to recover from the claimant's consignment of sulphur *ex Abbazia*, in consideration of their having carried the said sulphur on board the *Abbazia* and having paid certain charges, liens and expenses thereon at Port Empedocle, the rate of freight stipulated for in the original bills of lading, together with the expenses and charges on the said sulphur paid by the libellant, and which the claimant would have had to pay if he had forwarded the sulphur himself. 1266

Sixth.—For that the Court dismissed the libel herein. 1267

Convers & Kirlin,
Proctors for Libellant.

[Endorsed:]—Libellant's assignment of errors, filed October 12, 1899.

1268

1269

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Second Circuit.

AUSTRO-AMERICANA STEAMSHIP COMPANY,

1270 Libellant,

AGAINST

1,500 Tons of Brimstone, ex. S. S. "ABBAZIA."

Assignment of Errors.

The libellant-appellant herein assigns error in the
1271 final decision of the United States District Court for the Southern District of New York herein as follows:

FIRST.—For that the Court refused to find that the *Styria* was justified in discharging the cargo as and when she did at Port Empedocle, and that accordingly under the stipulation between the parties entered into August 12th, 1898, the libellant had a lien upon and was entitled to recover from the claimant's consignment *ex Abbazia*, the damages, charges and expenses set forth in the libel.

1272

SECOND.—For that the Court did not hold that the ship was exonerated from bringing the sulphur forward on her then voyage by the existence of a state of war and the liability to capture, irrespective of the clauses in the bill of lading.

THIRD.—For that the Court held that the ship was bound to wait until May 10th before exercising the privilege contained in the bill of lading of landing and storing the sulphur at Port Empedocle, and that if she

had so waited, she could have safely proceeded on her voyage with the sulphur. 1273

Fourth.—For that the Court held that the forwarding of the sulphur by the shipowners, on the steamship *Abbazia* did not, under the transshipment clause in the bill of lading relieve them from liability for damages caused by the failure to carry the sulphur forward on the *Styria*.

Fifth.—For that the Court omitted and refused to find that the libellant was entitled to recover from the claimant's consignment of sulphur *ex Abbazia*, in consideration of their having carried the said sulphur on board the *Abbazia* and having paid certain charges, liens and expenses thereon at Port Empedocle, the rate of freight stipulated for in the original bills of lading, together with the expenses and charges on the said sulphur paid by the libellant, and which the claimant would have had to pay if he had forwarded the sulphur himself. 1274 1275

Sixth.—For that the Court dismissed the libel herein.

Convers & Kirlin,
Proctors for Claimant.

[Endorsed:]—Libellant's assignment of errors, filed Oct. 12, 1899.

1276

1277

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Second Circuit.

Austro-Americana Steamship Company, Libellant, against 100 Tons of Brimstone owned by John Munroe *et al.*, *ex* S. S. "Abbazia."	Assignment of Errors.

1278

The libellant-appellant herein assigns error in the
1279 final decision of the United States District Court for the Southern District of New York herein as follows:

First.—For that the Court refused to find that the *Styria* was justified in discharging the cargo as and when she did at Port Empedocle, and that accordingly under the stipulation between the parties entered into August 12th, 1898, the libellant had a lien upon and was entitled to recover from the claimant's consignment *ex Abbazia*, the damages, charges and expenses set forth
1280 in the libel.

Second.—For that the Court did not hold that the ship was exonerated from bringing the sulphur forward on her then voyage by the existence of a state of war and the liability to capture, irrespective of the clauses in the bill of lading.

Third.—For that the Court held that the ship was bound to wait until May 10th before exercising the privilege contained in the bill of lading of landing and

storing the sulphur at Port Empedocle, and that if she had so waited, she could have safely proceeded on her voyage with the sulphur. 1281

Fourth.—For that the Court held that the forwarding of the sulphur by the shipowners, on the steamship *Abbazia* did not, under the transshipment clause in the bill of lading relieve them from liability for damages caused by the failure to carry the sulphur forward on the *Styria*.

1282

Fifth.—For that the Court omitted and refused to find that the libellant was entitled to recover from the claimant's consignment of sulphur *ex Abbazia*, in consideration of their having carried the said sulphur on board the *Abbazia* and having paid certain charges, liens and expenses thereon at Port Empedocle, the rate of freight stipulated for in the original bills of lading, together with the expenses and charges on the said sulphur paid by the libellant, and which the claimants would have had to pay if they had forwarded the sulphur themselves. 1283

Sixth.—For that the Court dismissed the libel herein.

Convers & Kirlin,
Proctors for Libellant.

[Endorsed:]—Libellant's assignment of errors, filed Oct. 30, 1899.

1284

1285

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Second Circuit.

James L. Morgan *et al.*,
Libellants-Appellants,

1286

vs.

The Steamship "Styria," Antonio G. Scopinich,
Claimant-Appellant.

Assignment of Error.

The libellants above named hereby assign error in the
1287 decision of the District Court herein, as follows:

1. Said Court erred in allowing as damages the sum of $114.92 only.

2. Said Court erred in not allowing as damages at least the sum of $2,986.54.

3. Said Court erred in affirming the report of the Commissioner, which adopted an erroneous method of assessing the damages herein.

1288

4. Said Court erred in holding that the clause in the bill of lading limiting liability to the invoiced or declared value of the goods was applicable to the case.

Dated New York, August 15th, 1899.

Cowen, Wing, Putnam & Burlingham,
Proctors for Libellants-Appellants.

[Endorsed:]—Libellant's assignment of errors, filed Aug. 16, 1899.

UNITED STATES CIRCUIT COURT OF APPEALS, 1289

FOR THE SECOND CIRCUIT.

SCHUYLER L. PARSONS,
Libellant,

AGAINST

The Steamship "STYRIA," her engines, etc.,
Claimant.

Assignment of Errors. 1290

The libellant-appellant herein assigns error in the final decision of the United States District Court for the Southern District of New York herein, as follows:

FIRST.—That the Court decreed that the libellant was entitled to recover only the invoice value of the brimstone. 1291

SECOND.—That the libellant was not allowed to recover, as his damages, the value of the goods at the port of New York on or about the 5th day of June, 1898, when the steamship *Styria* arrived without the goods.

THIRD.—That the libellant was not awarded his full costs and disbursements in this cause because of an offer of judgment made by the claimant. 1292

BOWERS & SANDS,
Proctors for Libellant.

[Endorsed:]—Libellant's assignment of errors, filed Oct. 13, 1899.

1293

UNITED STATES CIRCUIT COURT OF APPEALS,

Second Circuit.

Alfred S. Malcomson

against

1294 The Steamship "Styria," her engines, etc.

Assignment of Errors.

Libellant-appellant herein assigns error in the final decree of the United States District Court for the Southern District of New York herein, as follows:

First.—That the Court limited the damages recoverable by the libellant herein to the sum of $1,044.81.

1295

Second.—That the Court held that any stipulation in the bill of lading was effectual to limit the damages recoverable by libellant.

Third.—That the Court did not hold that the ordinary rule of damages for breach of contract of carriage by the carrier, was applicable in this case without regard to the bill of lading.

Fourth.—That the Court held that the provision in
1296 the bill of lading limiting recovery by the shipper in case of loss or damage to goods, to the invoice value of the goods shipped, had any other effect than to fix the maximum of damages recoverable.

Fifth.—That the Court held that since, under the provision of the bill of lading in question, the damages recoverable by the shipper in case of total loss could never exceed the invoice value of the goods, therefore damages resulting from any other cause than total loss, whatever the amount, in fact, must be limited to the difference between the invoice value of the goods and the

actual amount for which they were sold, less only freight and weighing charges. 12 7

SIXTH.—That the Court held that the stipulation between the parties, dated August 12th, 1898, affected the right of the libellant to damages, or the amount of damages recoverable by him herein.

SEVENTH.—That the Court overruled libellant's exceptions to the report of the Commissioner herein.

EIGHTH.—That the Court confirmed the report of the Master herein. 1982

SULLIVAN & CROMWELL,
Proctors for Libellant.

[Endorsed:]—Libellant's assignment of error, filed Oct. 13, 1899.

UNITED STATES CIRCUIT COURT OF APPEALS, 12 9

SECOND CIRCUIT.

JOHN MUNROE, EDGAR LOCKWOOD, HENRY W. MUNROE and FREDERICK DE REISET

AGAINST

Steamship "STYRIA," her engines, etc.

Assignment of Errors. 1300

The libellants, the appellants herein, assign errors in the final decree of the United States District Court for the Southern District of New York herein as follows:

FIRST.—That the Court limited the damages recoverable by the libellants herein to the sum of Five hundred and sixty-three and 99/100 dollars ($563.99).

1301 SECOND.—That the Court held that any stipulation in the bill of lading was effectual to limit the damages recoverable by the libellants.

THIRD.—That the Court did not hold that the ordinary rule for damages for breach of contract of carriage by the carrier was applicable in this case without regard to the bill of lading.

FOURTH.—That the Court held that the provision in
1302 the bill of lading, limiting the recovery by the shipper in case of loss or damage to goods, to the invoice value of the goods shipped, had any other effect than to fix the memorandum of damages recoverable.

FIFTH.—That the Court held that since under the provision of the bill of lading in question the damages recoverable by the shipper, in case of total loss, could never exceed the invoice value of the goods, therefore damages resulting from any other cause than total loss, whatever the amount, in fact must be limited to the
1303 difference between the invoice value of the goods and the actual amount for which they were sold, less only freight and weighing charges.

SIXTH.—That the Court held that the stipulation between the parties, dated October 12th, 1898, affected the rights of the libellants to damages, or the amount of damages recoverable by them herein.

SEVENTH.—That the Court overruled libellants' ex-
1304 ceptions to the report of the Commissioner herein.

EIGHTH.—That the Court confirmed the report of the master herein.

STERN & RUSHMORE,
Proctors for Libellants,
40 Wall Street, N. Y.

[Endorsed:]—Libellants' assignment of errors.—Filed November 1, 1899.

UNITED STATES CIRCUIT COURT OF APPEALS, 1305

FOR THE SECOND CIRCUIT.

JAMES L. MORGAN *et al.*,
Libellants,

AGAINST

The Steamship "STYRIA," ANTONIA G. SCOPINICH,
Claimant.

Assignment of Errors 1306

The claimant-appellant herein assigns error in the final decision of the United States District Court for the Southern District of New York herein as follows:

FIRST.—That the Court decreed that the libellants should recover damages by reason of the matters alleged in the libel. 1307

SECOND.—That the Court did not dismiss the libel.

THIRD.—That the Court found that the ship was not justified in discharging and storing the sulphur at Port Empedocle, as and when she did.

FOURTH.—That the Court did not hold that the ship was exonerated from bringing the sulphur forward on her then voyage by the existence of a state of war and the liability to capture, irrespective of the clauses in the bill of lading. 1308

FIFTH.—That the Court held that the ship was bound to wait until May 10th before exercising the privilege contained in the bill of lading of landing and storing the sulphur at Port Empedocle, and that if she had so waited, she could have safely proceeded on her voyage with the sulphur.

1309 SIXTH.—That the Court held that the forwarding of the sulphur by the shipowners, on the steamship *Abbazia* did not, under the transshipment clause in the bill of lading relieve them from liability for damages caused by the failure to carry the sulphur forward on the *Styria*.

SEVENTH.—That the Court held that notwithstanding the provision in the bill of lading limiting the ship's liability to the invoice value of the sulphur, and the
1310 stipulation which provided that the proceeds of the sale of the sulphur, less charges at New York incident to its sale (excluding freight), should be credited against the libellants' claim herein, and notwithstanding that the said proceeds equaled or exceeded the said invoice value, the Court entered a decree adjudging that the libellants recover damages against the *Styria* herein.

EIGHTH.—That the Court found that freight should be deducted as a charge incurred in the sense of the stipulation entered into by the parties August 12th,
1311 1898, in determining the net proceeds of sale to be credited against libellants' claim.

CONVERS & KIRLIN,
Proctors for Claimant.

[Endorsed:]—Claimant's Assignment of Errors.—Filed Oct. 12, 1899.

1312

UNITED STATES CIRCUIT COURT OF APPEALS, 1313

FOR THE SECOND CIRCUIT.

SCHUYLER L. PARSONS,
Libellant,

AGAINST

The Steamship "STYRIA," ANTONIO G. SCOPINICH,
Claimant.

Assignment of Errors. 1314

The claimant-appellant herein assigns error in the final decision of the United States District Court for the Southern District of New York herein as follows:

FIRST.—That the Court decreed that the libellant should recover damages by reason of the matters alleged in the libel. 1315

SECOND.—That the Court did not dismiss the libel.

THIRD.—That the Court found that the ship was not justified in discharging and storing the sulphur at Port Empedocle, as and when she did.

FOURTH.—That the Court did not hold that the ship was exonerated from bringing the sulphur forward on her then voyage by the existence of a state of war and the liability to capture, irrespective of the clauses in the bill of lading. 1316

FIFTH.—That the Court held that the ship was bound to wait until May 10th before exercising the privilege contained in the bill of lading of landing and storing the sulphur at Port Empedocle, and that if she had so waited she could have safely proceeded on her voyage with the sulphur.

1317 SIXTH.—That the Court held that the forwarding of the sulphur by the shipowners, on the steamship *Abbazia* did not, under the trans-shipment clause in the bill of lading, relieve them from liability for damages caused by the failure to carry the sulphur forward on the *Styria*.

SEVENTH.—That the Court held that notwithstanding the provision in the bill of lading limiting the ship's liability to the invoice value of the sulphur, and then
1318 stipulation which provided that the proceeds of the sale of the sulphur, less charges at New York incident to its sale (excluding freight), should be credited against the libellant's claim herein, and notwithstanding that the said proceeds equaled or exceeded the said invoice value, the Court entered a decree adjudging that the libellant recover damages against the *Styria* herein.

EIGHTH.—That the Court found that freight should be deducted as a charge incurred in the sense of the stipulation entered into by the parties August 12th,
1319 1898, in determining the net proceeds of sale to be credited against libellant's claim.

CONVERS & KIRLIN,
Proctors for Claimant.

[Endorsed:]—Claimant's assignment of errors, filed Oct. 12, 1899.

1320

UNITED STATES CIRCUIT COURT OF APPEALS, 1321

FOR THE SECOND CIRCUIT.

ALFRED S. MALCOMSON,
Libellant,

AGAINST

The Steamship "STYRIA," ANTONIO G. SCOPINICH,
Claimant.

Assignment of Errors. 1322

The claimant-appellant herein assigns error in the final decision of the United States District Court for the Southern District of New York herein as follows:

FIRST.—That the Court decreed that the libellant should recover damages by reason of the matters alleged in the libel. 1323

SECOND.—That the Court did not dismiss the libel.

THIRD.—That the Court found that the ship was not justified in discharging and storing the sulphur at Port Empedocle, as and when she did.

FOURTH.—That the Court did not hold that the ship was exonerated from bringing the sulphur forward on her then voyage by the existence of a state of war and the liability to capture, irrespective of the clauses in the bill of lading. 1324

FIFTH.—That the Court held that the ship was bound to wait until May 10th before exercising the privilege contained in the bill of lading of landing and storing the sulphur at Port Empedocle, and that if she had so waited, she could have safely proceeded on her voyage with the sulphur.

1325 SIXTH.—That the Court held that the forwarding of the sulphur by the shipowners, on the steamshep *Abbazia* did not, under the transshipment clause in the bill of lading, relieve them from liability for damages caused by the failure to carry the sulphur forward on the *Styria*.

SEVENTH.—That the Court held that notwithstanding the provision in the bill of lading limiting the ship's liability to the invoice value of the sulphur, and the
1326 stipulation which provided that the proceeds of the sale of the sulphur, less charges at New York incident to its sale (excluding freight), should be credited against the libellant's claim herein, and notwithstanding that the said proceeds equaled or exceeded the said invoice value, the Court entered a decree adjudging that the libellant recover damages against the *Styria* herein.

EIGHTH.—That the Court found that freight should be deducted as a charge incurred in the sense of the stipulation entered into by the parties August 12th,
1327 1898, in determining the net proceeds of sale to be credited against libellant's claim.

CONVERS & KIRLIN,
Proctors for Claimant.

[Endorsed:]—Claimant's assignment of errors, filed Oct. 12, 1899.

1328

1329

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Second Circuit.

JOHN MUNROE *et al.*,
Libellants,

AGAINST

The Steamship "STYRIA," ANTONIO G. SCOPINICH,
Claimant.

Assignment of Errors. 1330

The claimant-appellant herein assigns error in the final decision of the United States District Court for the Southern District of New York herein as follows:

FIRST.—That the Court decreed that the libellants should recover damages by reason of the matters alleged in the libel. 1331

SECOND.—That the Court did not dismiss the libel.

THIRD.—That the Court found that the ship was not justified in discharging and storing the sulphur at Port Empedocle, as and when she did.

FOURTH.—That the Court did not hold that the ship was exonerated from bringing the sulphur forward on her then voyage by the existence of a state of war and the liability to capture, irrespective of the clauses in the bill of lading. 1332

FIFTH.—That the Court held that the ship was bound to wait until May 10th before exercising the privilege contained in the bill of lading of landing and storing the sulphur at Port Empedocle, and that if she had so waited she could have safely proceeded on her voyage with the sulphur.

1333 SIXTH.—That the Court held that the forwarding of the sulphur by the shipowners, on the steamship *Abbazia* did not, under the transshipment clause in the bill of lading, relieve them from liability for damages caused by the failure to carry the sulphur forward on the *Styria*.

SEVENTH.—That the Court held that notwithstanding the provision in the bill of lading limiting the ship's liability to the invoice value of the sulphur, and the
1334 stipulation which provided that the proceeds of the sale of the sulphur, less charges at New York incident to its sale (excluding freight), should be credited against the libellants' claim herein, and notwithstanding that the said proceeds equaled or exceeded the said invoice value, the Court entered a decree adjudging that the libellants recover damages against the *Styria* herein.

EIGHTH.—That the Court found that freight should be deducted as a charge incurred in the sense of the stipulation entered into by the parties August 12th,
1335 1898, in determining the net proceeds of sale to be credited against libellants' claim.

CONVERS & KIRLIN,
Proctors for Claimant.

[Endorsed:]—Claimant's assignment of errors, filed Oct. 30, 1899.

1336

1337

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

JAMES L. MORGAN,
Libellant-Appellant,

vs.

The Steamship "STYRIA," her engines, etc.,
Respondent-Appellee,

And Seven Other Cases.

Assignment of Errors.

1338

I, SAMUEL H. LYMAN, Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby certify, that the foregoing is a correct transcript of the record of the District Court in the above entitled cause made up pursuant to Rule No. 4 in Admiralty of the United States Circuit Court of Appeals, for the Second Circuit. 1339

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 25th day of January, in the year of our Lord one thousand nine hundred, and of the independence of the said United States the one hundred and twenty-fourth. 1340

[SEAL.]

SAM. H. LYMAN,
Clerk.

[Endorsed :]—District Court of the United States for the Southern District of New York—James L. Morgan *et al.*, Libellant-Appellant, agst. the S. S. *Styria*, her engines, etc., Respondent-Appellee, and seven other cases—Apostles.—Stamped on page: United States District Court of Appeals, Second Circuit—Filed Jan. 25, 1900—William Parkin, Clerk.

United States Circuit Court of Appeals,

FOR THE SECOND CIRCUIT.

Nos. 137–144—October Term, 1899.

Submitted March 14, 1900. Decided April 3, 1900.

JAMES L. MORGAN *et al.*,
Libelants-Appellants,

vs.

THE STEAMSHIP "STYRIA," her engines, &c., ANTONIO SCOPINICH,
Claimant-Appellant.

SCHUYLER L. PARSONS,
Libelant-Appellant,

vs.

THE SAME,
Claimant-Appellant.

ALFRED S. MALCOMSON,
Libelant-Appellant,

vs.

THE SAME,
Claimant-Appellant.

Appeals from the District Court of the United States for the Southern District of New York.

Before Judges WALLACE, LACOMBE and SHIPMAN.

JOHN MUNROE *et al.*,
Libelants-Appellants,

vs.

THE SAME,
Claimant-Appellant.

AUSTRO-AMERICANA STEAMSHIP COMPANY, owner of the Steamships "Styria" and "Abbazia,"
Libelant-Appellant,

vs.

3,250 CANTORS OF BRIMSTONE, owned by JAMES L. MUNROE & COMPANY,
Respondent-Appellee.

THE SAME,
Libelant-Appellant,

vs.

4,550 CANTORS OF BRIMSTONE, owned by SCHUYLER L. PARSONS,
Respondent-Appellee.

THE SAME,
Libelant-Appellant,

vs.

1,500 TONS OF BRIMSTONE, owned by ALFRED S. MALCOMSON,
Respondent-Appellee.

THE SAME,
Libelant-Appellant,

vs.

100 TONS BRIMSTONE, owned by JOHN MUNROE *et al.*,
Respondents-Appellees.

[337

These causes come here upon appeals from decrees of the District Court, Southern District of New York. There are four libels and cross-libels, arising out of the same transaction. The libelants are all owners of different lots of brimstone, shipped by the steamship *Styria* at Porto Empedocle, Sicily, in the month of April, 1898, and, the vessel not having brought over the brimstone, libeled her upon her arrival for damages resulting from her failure to bring it in accordance with the contract. Subsequently, by stipulation between the parties, the brimstone was brought over by the *Abbazia*, another steamer belonging to the Austro-Americana Steamship Company, which is the owner of the *Styria*, and upon its arrival here, was libeled by that company for expenses incurred in landing and storing in Sicily the brimstone in question. Decrees were entered in the District Court in favor of the libelants and cross-claimants, from which decrees the claimant and cross-libelants appealed. The libelants being dissatisfied with the amount of damages awarded by the District Court, appeal from so much of the decrees in their favor as limits their recovery to the amount actually awarded.

The facts sufficiently appear in the opinion.

LACOMBE, *Circuit Judge:*—The *Styria* is an Austrian steamer owned by the Austro-Americana

Steamship Company. She was bound on a voyage from Trieste via Sicilian ports to New York. She sailed from Trieste with some general cargo for New York on April 16, 1898, reached Cape Empedocle (Girgenti) her second port early on April 21, and began taking on brimstone on the afternoon of the same day. Five shippers at that place furnished for shipment about 2,200 tons, the cargo here involved, which was laden on the vessel by April 24, on which day the vessel was cleared at the Custom House and was ready to proceed on her voyage. The captain was under instructions to proceed to Messina and Palermo to fill up with fruits; fruit-cargo at these ports had been engaged.

About this time war broke out between this country and Spain. There is no dispute as to the sequence of historical events, which is as follows:

338] On April 20 Congress passed and the President approved the joint resolution recognizing the freedom and independence of the people of Cuba, and demanding that the Government of Spain relinquish its authority in the island and withdraw its land and naval forces. On the same day the Spanish Minister at Washington demanded and received his passports. On the morning of April 21 our Minister at Madrid was informed by the Spanish Minister of Foreign Affairs that the diplomatic relations between the two governments were broken off. On the same day he left Madrid. On April 23 the Queen Regent of Spain issued a decree announcing the existence of war with the United States, which was published in the official papers at Madrid on April 24 and communicated to the other powers and made public on or about April 25. On that day it was published in the newspapers of this country, and presumably in Sicily and England. The declaration of war was made by the United States under an act passed April 25, declaring the existence of war since April 21. There is no evidence in the case which

will warrant a finding that the captain knew that war had been declared before he shipped libelant's sulphur and signed bills of lading therefor. On April 25 the Queen Regent of Spain issued a proclamation, which contained the following provision:

"ART. V.—In order to capture the enemy's ships, to confiscate the enemies merchandise under their own flag, and contraband of war under any flag, the Royal Navy, auxiliary cruisers and privateers, if and when the latter are authorized, will exercise the right of visit on the high seas and in the territorial waters of the enemy, in accordance with international law and any regulations which may be published for the purpose.

"ART. VI.—Under the denomination contraband of war the following articles are included:

Cannons, machine-guns, * * * powder, sulphur, saltpeter, etc., etc."

Thereafter, and while the state of war continued unmodified, under the rules of international law sulphur or brimstone shipped and owned as this was, was subject to seizure by war vessels of Spain on the high seas, a process which would involve the arrest of the neutral vessel carrying it wherever she might be, off the coast of Sicily, in the Straits of Gibraltar, or on the banks of Newfoundland, her enforced deviation from her voyage to a Spanish port and her detention there until a Spanish prize court should have determined the questions arising upon confiscation of the cargo. [339

It appears from the record that on April 27 the captain knew that Spain and the United States were at war. On that day he began to discharge and warehouse the sulphur, notifying the shippers that he did so "on finding risky my passage to New York, with the actual sulphur cargo, for facts of war." The unloading of the sulphur was completed on May 7, and shippers again notified. On the same day she cleared, and on the next morning,

May 8, proceeded on her voyage with the cargo laden at Trieste, picked up her fruit at Messina and Palermo, and sailed from Italian waters May 9th, reaching New York on June 3d.

It seems manifest that, upon the outbreak of war, a voyage with contraband on board to the port of one of the belligerents might fairly be regarded as a risky piece of business. The suggestion made upon the argument that the naval power of Spain was not such as would induce a "man of ordinary courage, judgment and experience" to hesitate to proceed is of no weight. We may not attribute to the captain of the *Styria* knowledge gained after the event; and indeed this Court is not advised of any historical facts which would warrant the conclusion that it was not entirely within the power of Spain during the first few months of the war to arrest and search every vessel westward bound through the Straits of Gibraltar, and picking her way along by the lighthouses on the Spanish coast.

340] The first question to be determined is whether with such a risk involved in the event of the vessel's proceeding with the sulphur on board, the captain was justified in relanding and warehousing it. Three clauses of the bill of lading are relied upon.

(*a.*) "Restraints of Princes and Rulers of People * * * excepted."

(*b.*) "In case of blockade or interdict of the port of discharge, or if, without such blockade or interdict, the master shall consider it unsafe for any reason, to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe at shipper's risk and expense, and on the goods being placed in charge of any mercantile agent or of British Consul, and a letter being put into the Post Office addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the

shipper's risk and expense and the master and owners discharged from all responsibility."

(*c.*) "With liberty (in event of steamer putting back to this or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or trans-ship the goods by any other steamer."

The second clause above quoted was made most prominent upon the argument; question being raised whether it was applicable to a condition of affairs existing elsewhere than at the port of discharge, and also whether as matter of fact the master exercised the option provided for; whether he did himself consider the voyage unsafe;—there being evidence tending to show that he landed the sulphur because of telegraphic orders from the steamer's managers in Glasgow. We do not find it necessary to discuss this branch of the case, because we find in clause (*a*) abundant authority for a refusal to carry forward the sulphur while such a condition of affairs existed as that already described as being generally known to exist when the discharge began on April 27. There is no logical difference between a restraint of [341 Princes and Rulers exercised by a cruiser with power to visit, search and seize lying two leagues off Cape Empedocle, and that exercised by a half-dozen cruisers patrolling a narrow strait through which, if the voyage be made, the vessel must pass. Under such circumstances the owner of contraband cargo (loaded as this was before war broke out) could with reason insist that it would be gross negligence on the part of the ship to bring his cargo forward. Moreover it would certainly be unreasonable to require the ship to remain in port with the contraband cargo on board until the war should cease, a period of months, possibly years. The owners of other cargo not contraband have rights as much, if not more entitled to consideration than those of the owners who have been unfortunate enough to ship the cargo which has produced the risk.

That a blockade is within the term "restraints of rulers and princes" has been settled for the federal courts by the decision in Olivera *v.* Ins. Co., 3 Wheat., 183. That a well-founded apprehension of capture by the cruisers of a belligerent is the equivalent of an actual restraint is the doctrine of the later authorities. The case of Dickinson *v.* Ritchie, 10 East., 530, mainly relied on by libelants, is not in point; the only excuse there offered was that the captain apprehended an embargo would be laid, but in the case at bar he knew that war had been declared. In Geipel *v.* Smith, L. R., 7 Q. B., 410 Cockburn, *C. J.*, says: "Is a blockade a restraint of princes? I think it is * * * provided the blockade is effective: and in the eye of the law a blockade is effected if the enemies' ships are in such numbers and position as to render the running of the blockade a matter of danger, although some vessels may succeed in getting through. * * * It would be monstrous to say that in such a case the parties must wait—for the obligation must be mutual—till the restraint be taken off—the shipper with cargo which might be perishable, or its market value destroyed—the ship-owner with his ship lying idle, possibly rotting." In Rodoconachi *v.* Elliott, L. R., 9 C. P., 518, the Exchequer
342] Chamber held to the same effect where goods in transit from China to England had reached Paris just at the beginning of its siege by the Germans, and it appeared that an effort to remove them would probably have resulted in their seizure. In Nobels Explosives Co. *v.* Jenkins & Co., L. R., 1896, 2 Q. B., goods, contraband in the event of war, were shipped from England to Yokohama. While on the high seas war broke out between China and Japan, of which the master heard when he put into Hong Kong, whereupon he discharged the goods and placed them in safe custody and continued his voyage to Yokahama. The Court sustained the ship saying: "The goods were as effectually stopped at Hong Kong as if there had been an express order

from the Chinese government that contraband of war should be landed."

Inasmuch as the master, where the contract was made in times of peace, could properly decline to carry forward a cargo which by the subsequent breaking out of war had become contraband, we fail to see why he should not have the right to land such contraband cargo, with all proper precautions as to safe-keeping, thus leaving his ship free to discharge its obligations to innocent cargo without risk of delay by reason of an actual arrest which would be caused only by the presence of such contraband cargo. The ship made no contract to carry contraband of war to the port of a belligerent, and should not be held to the obligations of a contract into which she has never entered. We understand that the District Court reached this same conclusion, but found the ship in fault because she did not wait a reasonable period to see if there might not be some reasonable assurance of safety; and held that "the commencement of the discharge on the 27th was too hasty and precipitate." This brings us to the next branch of the case.

When two nations formally proclaim the existence of a state of war between themselves with all the solemnity observed in this instance, it would seem to be going too far to say that parties whose contracts are affected thereby should wait some indefinite time, which a court shall find reasonable, [343 in a vague expectation that the belligerents may think better of it and make peace. A situation is quite conceivable, where delay might fairly be required. Thus the minister of one power or the other might demand his passports, or the day named in an ultimatum might pass without compliance with its requirements: or a squadron of the war vessels of one power might impress seamen from the deck of the war vessel of another power, as the *Carnatic* and her consorts did with the *Baltimore* in 1798, or the war vessel of one power encountering the war

vessel of another upon the high seas might pour broadside after broadside into her, as the *Leopard* did with the *Chesapeake* in 1807 - any one of which acts would seem to import the imminence if not the actual existence of war, and yet might fall short of being such authoritive evidence of a state of belligerency as would justify a master in treating any part of his cargo as being thereby made contraband. But the situation shown here was a very different one; both nations had united in proclaiming to the whole world that they were at war, and we know of no reason why the master of any vessel of a neutral nation was bound to wait twenty-four hours, or twenty-four days or twenty-four weeks, to see if the two belligerents would not settle their differences.

As soon as he learned that war was declared the master knew that the cargo he had taken on board at Port Empedocle was contraband. "I knew," says he, "that sulphur is to make gunpowder; everybody knows that. * * * I thought it must be contraband." We should have some doubts as to the efficiency of a master for international commerce who did not know that sulphur was contraband of war. It certainly should be a safe assumption for the master of a neutral vessel to make that he cannot carry such cargo to the ports of one belligerent without risking its seizure by the other. And, in the absence of special circumstances, there would seem to be no necessity to wait for further assurance in that regard. In the case at bar, however, there were special circumstances which will be next considered.

344] The exportation of sulphur is one of the greatest industries of the island of Sicily, and the Italian government was naturally solicitous that the trade in sulphur with the United States should not be interfered with. It now appears in the record by reports obtained from diplomatic sources that shortly after the proclamation of the Queen Regent negotiations were opened by the

Italian government to secure a modification of its provisions so that sulphur should not be considered contraband of war. The Spanish Government declined to alter the decree, but on April 29th at Madrid the Spanish Minister for Foreign Affairs "verbally" [*sic:* orally?] stated to the Italian Ambassador that orders would be given to the Naval Departments, as a temporary measure, not to treat sulphur as contraband of war. The same statement was made by the Spanish Minister for Foreign Affairs to the British Ambassador on May 6th. On May 31st the same Minister stated in an official note to both the Italian and the British Ambassadors that the treatment by Spain of sulphur as contraband of war would be temporarily suspended, and that the order which had been given to that effect would not be revoked without due notice.

Not being in telephonic communication with the chancellery of the Embassy at Madrid, the master of the *Styria* was not advised of these transactions at the moment they occurred. And his conduct is to be judged not in the light of exact knowledge acquired after the event, but by such information as may have been available for him at the time and place. As we have seen he knew certainly on April 27th and probably on April 26th that war had been declared, and that his sulphur cargo was contraband; that he was, therefore, entitled to land and store it, thus leaving his ship free to carry out her obligations to the rest of the cargo. On May 25th the *Giornale di Sicilia*, a newspaper published at Palermo and which the captain saw from day to day stated that Messina merchants had asked their Parliamentary Deputy to urge the Government to cooperate to exclude brimstone from being considered contraband. From day to day thereafter the paper was filled with reports and rumors as to [345 the progress of this movement to secure exemption. But down to the 6th of May not one of these reports bore the stamp of authority; no one vouched for their accuracy. The statements in the clippings

from the newspaper which have been printed in the record are merely the expression of the beliefs and expectations of its correspondents in Rome, or elsewhere furnishing copy to a paper published in a community where an intense interest was felt in having sulphur exempted. There was no reason why it should be exempted; it is a variety of merchandise such as always has been contraband, its exportation to the United States might well be considered an "aid" to Spain's enemy; no one appears to have suggested that the United States concede the same exemption. On the one hand it might be urged that it would please the government and people of Italy to grant the request, but on the other hand, in the case of merchandise so highly contraband neither the Italian Government nor people could justly take offense, if Spain should insist on exercising the rights which international law accords to every belligerent. Enlightened by the information now made known, we can see that the hopeful prognostications of the writers for the Journal of Sicily were well founded, but there was nothing to give any such assurance at the time they appeared We should hesitate to hold that it was the duty of a master under similar circumstances to delay action on the expectation that a belligerent would voluntarily abandon one of its weapons, on no better assurance that such action would be taken than the statements of anonymous and irresponsible contributors to a newspaper published in a community which is extremely solicitous that such action be taken.

By May 6th, however, the situation changed. The Journal of Sicily published an official declaration from the Italian Minister of Agriculture, Industry and Commerce, as follows:

"Chamber of Commerce, Palermo: I inform the Chamber of Commerce for the useful informa-
346] tion of merchants, that by the decree of April 23rd of the Spanish Government, are considered as contraband of war, arms, projectiles, fuses, powder, sulphur, nitre. * * * I would also state

that in consequence of our request, the Spanish Government has given notice to the commanders of its vessels to let sulphur pass free. (Signed) The Minister Coeco-Ortu." Here was an official declaration which the master should have accepted as sufficient. The Italian Government through a cabinet minister announces that official action has been taken by the Spanish Government, the practical result of which was to make sulphur free from capture. It matters not that the Spanish Government might thereafter reconsider this decision and direct its cruisers to seize sulphur, because it was to be assumed that cargos taken out in reliance upon the proclamation of the Italian Government would be respected. If they were not, the Italian Government would have good ground for claiming indemnity from Spain, and a *casus belli* in case of its refusal.

It is not quite clear on what day this proclamation was published in the Journal of Sicily. Each issue of that newspaper has a double date, and the issue containing it is dated "Thursday–Friday, 5th-6th May, 1898." The sulphur was not wholly discharged until May 7th. Even if it had been, however, this proclamation appearing before the steamer sailed upon her voyage we are clearly of the opinion that it was the master's duty to re-ship it, since the condition of affairs which made it contraband had ceased to exist. The loss sustained by reason of the expense of discharging and reloading so much of the sulphur as had been discharged before the changed condition was officially made known should be borne by the cargo owner; it was his misfortune that after he had put it aboard a war broke out which made his cargo contraband, and relieved the ship from the obligation to carry it while it remained in that condition. The ship, however, is liable for any loss sustained in consequence of her failure to carry and deliver when she could do so safely. There was no loss or deterioration of the sulphur, but there was a loss of market. The value of sul- [347
phur on the day it would have reached this market had it been reshipped and brought forward

when the Italian proclamation was published was greatly in excess of its value when it finally reached here.

The measure of damages in such cases is well settled; the loss is the difference between the price the goods actually brought and the price they would have brought had they been sold on the day when they should have arrived. The only remaining question in the case is whether this method of calculation is modified by the express terms of the contract.

The bill of lading contains the following clause: "The ship owner is not to be liable for any damage to any goods which are capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods, nor for claim for damage or detention of goods under through bill of lading, where the damage is done or detention occurs whilst the goods are not in possession of the ship owner, nor in any case for more than the invoice or declared value of the goods whichever shall be the least." The District Judge construed this as providing that in any settlement of loss or damage the invoice value and not the actual value of the goods should be taken as a basis, and therefore found the damage from loss of market to be the difference between such invoice value and the price the sulphur actually brought.

A similar clause has been so interpreted in the same district in the *Hadji*, 18 F. R., 459, and Pearse *v.* Quebec Steamship Company, 24 F. R., 285, and in the District of New Jersey in the *Lydian Monarch*, 23 F. R., 298. The *Hadji* was appealed, 20 F. R., 875, but the point was not passed upon in the Circuit Court. In the brief of counsel for claimant there is cited *The Aline*, 23 Blatchf., 335, but it does not sustain the proposition. We are unable to concur in the interpretation put upon this clause, for the reason that the language used does not seem to import any such idea. The statement that

the shipowner shall not be liable in any case
348] for more than the invoice value of the goods

is a simple and straightforward one; grammatically construed it fixes a final limit of liability beyond which he shall not be required to respond; it does not profess to regulate the calculation by which a loss is to be ascertained, if such loss is less than the limit. To give them such a meaning would seem to be to substitute for the contract the parties have made another and different one, which they might easily have made for themselves, had they wished to do so. Of a precisely similar clause the Supreme Court of Massachusetts said: "The words, 'the liability shall not exceed,' &c., are apt words to express the outside limit of the sum to be recovered; but both the particular words and the whole structure of the sentence are most inapt to express a stipulation that, if the goods are still equal to the invoice value there shall be no recovery at all." Brown *v.* Cunard S. S. Co., 147 Mass., 60.

The decree of the District Court is, therefore, reversed, and the cause remanded, with instructions to decree in favor of libelants for the difference between the proceeds of the sale (less charges of sale), and what would have been the proceeds (less charges of sale) of a similar sale on the day on which the sulphur could have been sold, had it been promptly reshipped and brought to this market—less the freight. Against which sum there is to be credited the proper expenses of discharging and reshipping at Cape Empedocle, as above indicated, and claimed in the cross libels. Interest will go with the balance, and, since both libelants and cross-libelants have prevailed, there should be no costs. In this Court, each side having prevailed in part, there will be no costs.

J. Parker Kirlin, for the "*Styria*."
E. B. Hill, for Malcomson and Munroe.
Latham G. Reed, for Parsons.
Charles C. Burlingham, for Morgan.

349] UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

OCTOBER TERM, 1899.

MORGAN and others (four libels) AGAINST The Steamship STYRIA. (And four cross-libels).	Nos. 137–144.

And now comes the Austro-Americana Steamship Company, owner of the steamship *Styria*, and respectfully prays that these cases be restored to the docket, and that a rehearing be ordered therein.

April 12, 1900.

J. PARKER KIRLIN,
Of Counsel for Appellant.

United States Circuit Court of Appeals, Second Circuit. Filed April 12, 1900. William Parkin, Clerk.

UNITED STATES CIRCUIT COURT [350
OF APPEALS,

SECOND CIRCUIT.

OCTOBER TERM, 1899.

MORGAN and others (four libels) AGAINST The Steamship STYRIA (and four cross-libels).	Nos. 137–144.

PETITION FOR REHEARING.

TO THE HONORABLE THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT:

The Austro Americana Steamship Company, owner of the steamship *Styria*, appellant in these causes, respectfully presents its petition for a rehearing of the decision as to the principle on which the damages in these cases should be adjusted.

The ground of the application, in brief, is that the cargo was brought forward by the shipowners after the libels herein were filed, and their liability had become fixed, under a stipulation which, in the circumstances, amounted to a contract between the parties that the proceeds of the sale of the cargo, less the costs of sale, should be credited against the claims for damages set forth in the libels, as limited by the terms of the bills of lading (fols. 788–789).

Sufficient emphasis, perhaps, was not laid on that point in the original brief of this appellant, though it was alluded to (*Brief*, p. 39).

Some confusion may have crept into the argument from a remark of the District Judge, in his opinion

351] overruling the exceptions to the Commissioner's report, from which this Court may have inferred that the case was considered to be one of "a partial loss" (fol. 1177).

In fact, it is submitted, the case is not one of partial loss, and the point which this Court has decided, with reference to the clause in the bills of lading, limiting damages to the amount of the invoice value, was really not involved in the present cases.

The petitioner's objection, here, is not to the rule established by the Court in its opinion, but it relates to the application of such a rule, to the facts and contracts, involved in these causes.

(1) The ship arrived in New York June 3, 1898. The libels were filed on June 4, 1898 (fol. 24); June 6, 1898 (fol. 100); June 4, 1898 (fol. 134), and June 7, 1898 (fol. 214). Each of those libels alleged non-delivery of the sulphur; some of them alleged a conversion; and all claimed damages for the full value of the shipments. Full security was furnished by the ship.

The Court has held, in its opinion, that the ship committed a breach of contract in failing to reload the sulphur on and after May 6th and bring it along on that voyage. Accordingly, if the cargo had not been forwarded under the subsequent stipulation or contract of August 12th (pp. 197–198), the libelants would have had decrees for full damages as limited by the bills of lading. It seems plain that, in that event, the damages would have been limited to the invoice value of the goods under the clause to that effect in the contracts of carriage (fol. 753). (*Hart* v. *Pennsylvania Railroad Co.* 112 U. S., 331, 341, 342; *Calderon* v. *Atlas Steamship Co.*, 170 U. S., 272, 278; *Graves* v. *Lake Shore Ry.*, 137 Mass., 33).

On the 12th of August, therefore, the situation of the parties was that the libelants had their claims for the non-delivery of the sulphur, and the shipowners had the sulphur in store and under their

control. The cargo owners were not willing to [352
have the cargo brought forward and to accept it, then, as performance of the original contract; but they were willing to have it forwarded under a new contract, which stated that the freight and the terms and condition of liability, during the voyage, should be those stated in the original bills of lading, that a certain specified disposition should be made of the cargo on its arrival, and that the proceeds of the sale less the costs of sale should be credited against the damages which might be recovered in the four pending suits (fols. 788–789). The shipowner also had an interest in insisting that the cargo should be sold and the proceeds credited against the claims for damages contained in the libels, because he understood those claims in the libels would necessarily be limited to the invoice or declared value of the goods, whichever should be the least (fol. 753); and he had good reason to suppose that the cargo would sell in New York for as much as the invoice value, and that by means of such an arrangement, his liability, if any, for refusing to bring the cargo forward in the ship originally would thus be in effect discharged or reduced to a small sum.

The material clauses of the stipulation of August 12th read as follows:

"It is stipulated and agreed between the parties as follows:

"1. The claimant shall forward the cargo landed *ex Styria* at Port Empedocle, on the first available steamer from that port to New York, and shall deliver the same to the consignees, upon the terms and for the freight specified in the original bill of lading, the consignees to receive the same and to pay the agreed freight on right and true delivery; ***the goods upon arrival to be sold at current market rates and the proceeds, less charges incurred, to be credited on account of the damages, if any, recovered by the libelants.*** * * *

353] "8. This stipulation and anything done by any party under it, shall be deemed to be wholly, *without prejudice* in the pending suits *except as herein provided*" (pp. 197, 198).

It is the omission of the Court to enforce that stipulation or contract between the parties, *in regard to the application of the proceeds of the sale of the cargo*, that occasions this petition for a rehearing.

The difference between the damages that would be recovered by the libelants, under the rule enunciated by this Court in its opinion and under the rule explicitly stated in the stipulation of August 12th, is very great. It may be emphasized by reference to the case of Malcolmson, which involves the largest amount. In the following table (*a*) the damages to be recovered under the rule laid down by the Court appear as they would be claimed by that libelant on the evidence so far taken, while in table (*b*) the damages are shown as they would be under the stipulation of August 12th.

Table (*a*.)

Market value on *Styria's* arrival of—	
500 tons best thirds (fol. 1121) at $30 a ton (fols. 999, 1012)	$15,000 00
1,000 tons best seconds (fol. 1121) at $33 a ton (p. 254)	33,000 00
	$48,000 00
Market value of sulphur realized on sale *ex Abbazia* (fol. 1122)	27,246 00
Difference	$20,754 00

Table (b.) [354

If the damages had been adjusted on the basis of the contract contained in the stipulation of August 12th, they would have been as follows:

Full damages for non-delivery, limited to invoice value (fol. 1122).		$28,500 31
Credit proceeds of sale (fol. 1122)	$27,246 00	
Less weighing	116 12	
	$27,129 88	
		27,129 88
Difference		$1,370 43

These results do not take account of the charges in Sicily that the Court has found should be deducted; but they serve to show the difference between what the shipowner supposed he was securing to himself by the stipulation of August 12th, and the result reached by the Court, without special regard to the effect of that stipulation.

It cannot be supposed either that the shipowners intended to increase their liabilities, by bringing the sulphur forward and delivering it under the terms of the stipulation of August 12th, or that the libelant Malcolmson expected to make $21,000 by means of the stipulation. The result reached is that he has received, in payment of the liability incurred by the ship owner through the breach of the contract, the proceeds of the sale of his sulphur amounting to $27,246, and will be in a position to recover, say, a further $20,754, making together $48,000 on a claim which by the clause of the bill of lading it was agreed should in no event exceed $28,500.31, the invoice value of his consignment.

Such a consequence was surely not intended to follow from the stipulation or the acts done under it.

The stipulation was very explicit in its terms, and contained a provision at the foot:

355] "3. This stipulation and anything done by any party under it shall be deemed to be wholly without prejudice in the pending suits *except as herein provided.*"

It was clearly intended that the stipulation *should prejudice the rights* of the parties to the extent that it varied such rights by its terms. The provision that it should not be otherwise prejudicial was simply intended to mean that the Court should not infer that either party considered he was in the wrong because he did something under the stipulation which might be inconsistent with his contention in the litigation.

If the shipowner had not brought the cargo forward at all, and had been adjudged to pay damages for its non-delivery, the damages would have been limited by the invoice value, and the shipowner would then have been entitled to the sulphur. He could have brought it forward himself and sold it, in this market, for the price at which the libelants sold it, and the proceeds of the sale would have substantially paid the judgments for damages.

A construction of the stipulation of August 12th which would leave the shipowner worse off, because he consented to take a step which was thought to be for the benefit of all concerned, than he would have been if he had rested on what he supposed were his rights under the contracts, cannot be presumed to be one that was contemplated when the stipulation was signed. But, if the rule for damages which the Court has announced is to be adhered to in spite of the stipulation, the shipowners will probably have to pay damages aggregating in the neighborhood of $30,000; while, if they had not forwarded the sulphur, but had paid the damages adjudged for non-delivery, and had then sold the sulphur for their own account, the net loss would have been under $5,000. It cannot be stated with definiteness just how much the damages to be recovered by the different libelants will amount to, because Morgan's case first went to a reference, and the plan of adjust-

ing the damages there adopted having been [356
confirmed, proof of the actual losses in the
other cases was not furnished; but it is believed that
the above estimate is approximately correct.

The shipowner earnestly requests a further hearing on the interpretation of his stipulation of August 12th, executed under the advice of counsel, which it is believed should be a bar to the adoption of such a rule for assessing the damages as has been announced in the opinion.

(2.) It should also be pointed out that the District Judge did not, in this case, actually adjust the damages as partial losses on the basis of the invoice value, as has been supposed by this Court. Though the Judge, in his opinion does in one place speak of a partial loss (fol. 1177), the damages were, in fact, adjusted in accordance with the stipulation, except that an error was committed, as the appellant contends, with regard to the deduction of freight (fol. 1111).

The Commissioner stated and the Court assessed the damages in the Morgan case as follows (fol. 1111):

Invoice value (full damages, as limited by bill of lading)			$4,279 00
Proceeds of sale (credit as per stip.)	$4,513 46		
Weighing	$24 40		
Freight	354 98		
		379 38	
			4,134 08
Balance			$144 92

In this table the invoice value was not taken as the *basis* of the damages, but it was treated as their *limit* under the terms of the bills of lading. Against the total damages so limited, the Court credited the proceeds of sale, under the terms of the stipulation, and then after deducting freight and expenses reached the balance which it was adjudged the shipowners were liable to pay.

357] Therefore, it is submitted, though this Court may disapprove of the construction of the invoice valuation clause, as applied to partial losses in the cases previously decided by Judge Brown, and which he referred to in his decision in this case, nevertheless the real point held in the earlier cases was not in fact involved here, because: (*a*) the libelants elected to treat their losses as total losses, arising from the non-delivery of the goods, as appears by their libel; (*b*) the shipowners and the libelants in their stipulation of August 12 contracted that the cargo brought forward by the ship under the terms of the original bills of lading should be sold for cash, and that the net proceeds of the sale should be credited on the existing claims, if valid; (*c*) the cargo was in fact sold pursuant to that stipulation, and the proceeds of sale were accounted for as credits to be applied to the libelant's claim for damages as for total losses, and not as for partial losses.

Instead of looking at the proceeds of sale only as credits to be applied in the payment of claims, the amounts of which were to be ascertained on a different basis, the Court has inadvertently used them, or permitted their use, for comparison with proceeds that might have been realized in June, and has awarded damages for the difference—a result contrary to the contract embodied in the stipulation of August 12th.

The petitioners, therefore, respectfully pray for a reconsideration of this branch of the cases and that they may be reheard to that end.

April 12, 1900.

AUSTRO-AMERICANA STEAMSHIP COMPANY,
By CONVERS & KIRLIN,
Proctors.

I hereby certify that in my opinion the foregoing application for a rehearing is meritorious, and entitled to the favorable consideration of the Court.

J. PARKER KIRLIN,
Of Counsel.

MORGAN and others (four libels)

vs.

S. S. "STYRIA" (and four cross-libels).

Per Curiam:

There may be a reargument on April 30th, solely on the effect of the stipulation as to bringing forward cargo and action thereunder upon the rights of the parties. It is suggested that for convenience of argument the several parties agree (solely for the purposes of such argument) upon arbitrary sums to represent:

1. Market value of the sulphur here less expenses of sale had the *Styria* reloaded it and brought it forward as soon as the Italian proclamation appeared.

2. Market value of sulphur less expenses of sale when it was actually sold.

3. Invoice value of the sulphur.

4. Freight.

5. Expenses of discharging and reloading at Port Empedocle.

6. Market value of sulphur in warehouse in Sicily immediately after the arrival of the *Styria*.

(Endorsed)—United States Circuit Court of Appeals, Second Circuit.—Morgan & others (four libels) *vs.* S. S. *Styria* (and four cross-libels).—Opinion, *Per Curiam*.—United States Circuit Court of Appeals, Second Circuit.—Filed Apr. 19, 1900.—William Parkin, Clerk.

359] UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

NOS. 137–144—October Term, 1899.

Re-argued May 4, 1900. Decided May 10, 1900.

JAMES L. MORGAN *et al.*, Libelants-Appellants,

vs.

THE STEAMSHIP "STYRIA," her engines, &c., ANTONIO SCOPINICH, Claimant-Appellant.

SCHUYLER L. PARSONS, Libelant-Appellant,

vs.

THE SAME, Claimant-Appellant.

ALFRED S. MALCOMSON, Libelant Appellant,

vs.

THE SAME, Claimant-Appellant.

Appeals from the District Court of the United States for the Southern District of New York.

Before Judges WALLACE, LACOMBE and SHIPMAN.

JOHN MUNROE *et al.*,
Libelants-Appellants,

vs.

THE SAME,
Claimant-Appellant.

AUSTRO-AMERICANA STEAMSHIP COMPANY, owner of the Steamships "Styria" and "Abbazia,"
Libelant-Appellant,

vs.

3,250 CANTORS OF BRIMSTONE, owned by JAMES L. MUNROE & COMPANY,
Respondent-Appellee.

THE SAME,
Libelant-Appellant,

vs.

4,550 CANTORS OF BRIMSTONE, owned by SCHUYLER L. PARSONS,
Respondent-Appellee.

THE SAME,
Libelant Appellant,

vs.

1,500 TONS OF BRIMSTONE, owned by ALFRED S. MALCOMSON,
Respondent-Appellee.

THE SAME,
Libelant-Appellant,

vs.

100 TONS OF BRIMSTONE, owned by JOHN MUNROE *et al.*,
Respondents-Appellees.

360] Re-argument of this cause (decided April 3, 1900) was had upon the single question as to the effect of the stipulation under which the sulphur was brought forward.

LACOMBE, *Circuit Judge.*—In the former opinion we held the ship in fault and bound to respond for the damages caused by loss of market; and that loss was declared to be the difference between the price the goods actually brought when they reached here, in another steamer of claimant's line, and the price they would have brought had they been sold on the day when they should have arrived. The difference is concededly less than the invoice value. The re-argument has induced no change of opinion on these propositions.

We fail to see that it makes any difference how the sulphur was brought forward. If the claimant failed to bring it, the owner could have withdrawn it from the Sicilian warehouse paying the *Styria's* lien for expenses of discharge, and the freight, and brought it forward himself. Or he might if he chose have sold it in Sicily. It is certainly clear that at the time the stipulation was signed, claimant could not have seized the sulphur and sold it for its own use—a deliberate act of conversion—and in the face of such willful tort could still have insisted on the limitation of liability clause contained in the bill of lading. Such being the situation and the libelants being in a posi-

tion where by application of the rule as to measure of damage above set forth they would be made whole—and only be made whole—for the loss they suffered by the ship's negligence, the claimant being at the same time protected against any liability in excess of the stipulated limit, it is contended that the effect of the stipulation is practically to destroy the libelants' right to relief; so that, although concededly they have lost over $20,000 through the ship's misconduct, they cannot recover anything; while by the same stipulation the ship gives up nothing. When the circumstances under which the stipulation was signed are taken into consideration it appears that its language does not import such a one-sided agreement. The libels had been filed, [361 all claiming damages for non-delivered sulphur at its full market value on the day it should have reached here. No answers had yet been interposed, nor claims made that the damages must be scaled down to the invoice value. When, therefore, the stipulation provided that the proceeds of the sulphur to be brought forward under its terms should be credited on account of the damages, it certainly was not intended that it should be credited twice, once by the application of the rule for determining difference of market values, and again by deducting the amount of such proceeds from the balance found upon applying the rule for ascertaining damages which the transactions and documents required.

The petition to modify the mandate is denied.

J. Parker Kirlin, for the "Styria."
Charles C. Burlingham, for Morgan.
M. H. Regensburger, for Munroe.
Edward B. Hill, for Malcomson.
Latham G. Reed, for Parsons.

362] At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms, in the Post Office Building, in the City of New York, on the 21st day of May, one thousand nine hundred.

Present—Hon. WILLIAM J. WALLACE, Hon. E. HENRY LACOMBE, Hon. NATHANIEL SHIPMAN, } *Circuit Judges.*

JAMES L. MORGAN *et al.*, Libelants-Appellants,

vs.

The Steamship "STYRIA," her engines, &c.,

ANTONIO SCOPINICH, Claimant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed, that the decree of said District Court be and it hereby is reversed, without costs, and cause remanded with instructions to enter a decree in accordance with the opinion of this Court.

It is further ordered, that a mandate issue to the said District Court in accordance with this decree.

E. H. L.

363]

(Endorsed)—United States Circuit Court of Appeals, Second Circuit.—James L. Morgan *et al.*, *vs.* SS. *Styria*.—Order for Mandate.—United States Circuit Court of Appeals, Second Circuit.—Filed May 22, 1900.—William Parkin, Clerk.

At a Stated Term of the United States Circuit Court of Appeals, for the Second Circuit, held at the United States Court Rooms, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 22d day of May, 1900.

Present--Hon. WILLIAM J. WALLACE,
Hon. E. HENRY LACOMBE,
Hon. NATHANIEL SHIPMAN,
Circuit Judges.

SCHUYLER L. PARSONS

AGAINST

Steamship STYRIA, her tackle, &c., Austro-Americana Steamship Company,
Claimant.

The appeals in the above entitled cause taken by the claimant having come on to be heard, and having been argued by the advocates of the respective parties, and due deliberation having been had in the premises;

Now, on motion of Bowers & Sands, proctors for the libelant, it is

ORDERED, ADJUDGED AND DECREED, that the final decree of the United States District Court for the Southern District of New York be, and the same is, hereby reversed, without costs.

And on like motion, it is

ORDERED that a mandate issue from this Court to the said District Court to take further proceedings

in accordance with this order and the opinion of the Court.

E. H. L.

(Endorsed)—U. S. Circuit Court of Appeals, for the Second Circuit.—Schuyler L. Parsons against Steamship *Styria*, her tackle, &c., Austro-Americana Steamship Company, Claimant.—Original order for Mandate and Notice of Settlement.—Bowers & Sands, Proctors for Schuyler L. Parsons, 31 Nassau Street, New York City, New York.—United States Circuit Court of
365] Appeals, Second Circuit.—Filed May 22, 1900. —William Parkin, Clerk.—Received May 11, 1900, Convers & Kirlin.

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366] At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the Court Rooms, in the Post Office Building, in the City of New York, on the 21st day of May, one thousand nine hundred.

Present—Hon. WILLIAM J. WALLACE,
Hon. E. HENRY LACOMBE,
Hon. NATHANIEL SHIPMAN,
Circuit Judges.

ALFRED S. MALCOMSON,
Libelant-Appellant,

vs.

The Steamship "STYRIA," her engines, &c.,
ANTONIO SCOPINICH,
Claimant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed, that the decree of said District Court be and it hereby is reversed, without costs, and cause remanded, with instructions to enter a decree in accordance with the opinion of this Court.

It is further ordered, that a mandate issue to the said District Court in accordance with this decree.

E. H. L.

(Endorsed.)—United States Circuit Court of Appeals, Second Circuit.—Alfred S. Malcomson *vs.* SS. *Styria.*—Order for Mandate.—United States Circuit Court of Appeals, Second Circuit.—Filed May 22, 1900.—William Parkin, Clerk. [367

368] At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms, in the Post Office Building, in the City of New York, on the 21st day of May, one thousand nine hundred.

Present—Hon. WILLIAM J. WALLACE,
Hon. E. HENRY LACOMBE,
Hon. NATHANIEL SHIPMAN,
Circuit Judges.

JOHN MUNRUE *et al.*,
Libelants-Appellants,
vs.
The Steamship "STYRIA," her engines, &c.
ANTONIO SCOPINICH,
Claimant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed, that the decree of said District Court be and it hereby is reversed, without costs, and cause remanded with instructions to enter a decree in accordance with the opinion of this Court.

It is further ordered, that a mandate issue to the said District Court in accordance with this decree.

E. H. L.

369]

(Endorsed)—United States Circuit Court of Appeals, Second Circuit.—John Munroe *et al. vs.* SS. *Styria*.—Order for Mandate.—United States Circuit Court of Appeals, Second Circuit.—Filed May 22, 1900.—William Parkin, Clerk.

At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, held in the United States Court Rooms, in the Federal Building, in the City of New York, Borough of Manhattan, on the 19th day of May, 1900.

Present—Hon. WILLIAM J. WALLACE,
Hon. E. HENRY LACOMBE,
Hon. NATHANIEL SHIPMAN,
Circuit Judges.

AUSTRO-AMERICANA STEAMSHIP COMPANY,
Libellant-Appellant,

AGAINST

3,250 CANTARS OF BRIMSTONE, owned by James L. Morgan and others, ex-Steamship *Abbazia*.

Order for Mandate.

The appeal by the libelant in the above entitled cause having come on to be heard, and having been argued by the advocates for the respective parties, and due deliberation having been had in the premises,

Now, on motion of Convers & Kirlin, proctors for the Austro-Americana Steamship Company, libelant, it is

ORDERED, ADJUDGED AND DECREED, that the final decree of the District Court for the Southern District of New York herein, be and the same is hereby reversed, without costs. And, on the like motion, it is further

ORDERED, that a mandate issue from this Court to the said District Court to take further proceedings

in accordance with this order and the opinion of the Court.

E. H. L.

371]

(Endorsed)—U. S. Circuit Court of Appeals, Second Circuit.—Austro-Americana S. S. Co., Liblt.-Applt., against 3,250 Cantars of Brimstone, owned by James L. Morgan and others, ex S. S. *Abbazia*.—Order for mandate and notice of settlement.—Convers & Kirlin, Proctors for Liblt.-Applt., 5 Beekman st., New York, N. Y.—United States Circuit Court of Appeals, Second Circuit.—Filed May 22, 1900.—William Parkin, Clerk.—Due service of a copy of the within and of the foregoing notice is admitted this 17th day of May, 1900.—Cowen, Wing, Putnam & Burlingham, Procs. for Clt.

372] At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, held in the United States Court Rooms, in the Federal Building, in the City of New York, Borough of Manhattan, on the 19th day of May, 1900.

Present—Honorable WILLIAM J. WALLACE,
Honorable E. HENRY LACOMBE,
Honorable NATHANIEL SHIPMAN,
Circuit Judges.

AUSTRO-AMERICANA STEAMSHIP COMPANY, Libelant-Appellant, AGAINST 4,550 CANTARS OF BRIMSTONE, owned by Schuyler L. Parsons, ex Steamship "ABBAZIA."	Order for Mandate.

The appeal by the libelant in the above entitled cause having come on to be heard, and having been

argued by the advocates for the respective parties, and due deliberation having been had in the premises;

Now on motion of Convers & Kirlin, proctors for the Austro-Americana Steamship Company, libelant, it is

ORDERED, ADJUDGED AND DECREED, that the final decree of the District Court for the Southern District of New York herein, be, and the same is hereby reversed, without costs. And on the like motion it is further

ORDERED, that a mandate issue from this Court to the said District Court to take further proceedings in accordance with this order and the opinion of the Court.

E. H. L.

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(Endorsed)—U. S. Circuit Court of Appeals, Second Circuit.—Austro-Americana S. S. Co., Liblt.-Applt., against 4,550 Cantars of Brimstone, owned by Schuyler L. Parsons, ex S. S. *Abbazia*.—Order for Mandate and Notice of Settlement.—Convers & Kirlin, Proctors for Liblt.-Applt., 5 Beekman Street, New York, N. Y.—United States Circuit Court of Appeals, Second Circuit.—Filed May 22, 1900.—William Parkin, Clerk.—Copy this day received, May 17, 1900.—Bowers & Sands.

374] At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, held in the United States Court Rooms, in the Federal Building, in the City of New York, Borough of Manhattan, on the 19th day of May, 1900.

Present—Honorable WILLIAM J. WALLACE,
Honorable E. HENRY LACOMBE,
Honorable NATHANIEL SHIPMAN,
Circuit Judges.

AUSTRO-AMERICANA STEAMSHIP COMPANY, Libelant-Appellant, AGAINST 1,500 TONS OF BRIMSTONE, ex-Steamship "ABBAZIA."	Order for Mandate.

The appeal by the libelant in the above entitled cause having come on to be heard, and having been argued by the advocates for the respective parties, and due deliberation having been had in the premises;

Now, on motion of Convers & Kirlin, proctors for the Austro-Americana Steamship Company, libelant, it is

ORDERED, ADJUDGED AND DECREED, that the final decree of the District Court for the Southern District of New York herein be, and the same is hereby reversed, without costs. And on the like motion it is further

ORDERED, that a mandate issue from this Court to the said District Court to take further proceedings

in accordance with this order and the opinion of the Court.

E. H. L.

[375

(Endorsed)—U. S. Circuit Court of Appeals, Second Circuit.—Austro-Americana S. S. Co., Liblt.-Applt., against 1,500 Tons of Brimstone, ex S. S. *Abbazia*.—Order for Mandate and Notice of Settlement.—Convers & Kirlin, Proctors for Liblt.-Applt., 5 Beekman St., New York. N. Y.—United States Circuit Court of Appeals, Second Circuit.—Filed May 22, 1900.—William Parkin, Clerk.—Received a copy of the within May 17, 1900. Sullivan & Cromwell.

[376

At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, held in the United States Court Rooms, in the Federal Building, in the City of New York, Borough of Manhattan, on the 19th day of May, 1900.

Present—Hon. WILLIAM J. WALLACE, Hon. E. HENRY LACOMBE, Hon. NATHANIEL SHIPMAN, } *Circuit Judges.*

AUSTRO-AMERICANA STEAMSHIP COMPANY, Libelant-Appellant,

AGAINST

100 TONS OF BRIMSTONE owned by John Munroe *et al.*, ex-Steamship "ABBAZIA."

Order for Mandate.

The appeal by the libelant in the above entitled cause having come on to be heard, and having been

argued by the advocates for the respective parties, and due deliberation having been had in the premises;

Now on motion of Convers & Kirlin, proctors for the Austro-Americana Steamship Company, libelant, it is

ORDERED, ADJUDGED AND DECREED, that the final decree of the District Court for the Southern District of New York herein, be, and the same is hereby reversed, without costs. And on the like motion it is further

ORDERED, that a mandate issue from this Court to the said District Court to take further proceedings in accordance with this order and the opinion of the Court.

E. H. L.

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(Endorsed)—U. S. Circuit Court of Appeals, Second Circuit.—Austro-Americana S. S. Co., Liblt.-Applt., against 100 Tons of Brimstone owned by John Munroe *et al.*, ex S. S. *Abbazia*.—Order for Mandate and Notice of Settlement.—Convers & Kirlin, Proctors for Liblt.-Applt., 5 Beekman St., New York, N. Y.--United States Circuit Court of Appeals, Second Circuit.—Filed May 22, 1900.—William Parkin, Clerk.—State, City and County of New York, ss.:—William Schnaufer, Jr., being duly sworn, deposes and says that he is a clerk in the office of Convers & Kirlin, proctors for the libelant herein, and that on the 17th day of May, 1900, he served a copy of the within on Stern & Rushmore, proctors for claimant of brimstone, by leaving the same with the person in charge of their office, No. 40 Wall St., New York, between the hours of 12 and 2 P. M.—Sworn to before me this 19th day of May, 1900. W. Schnaufer, Jr.—James T. Kilbreth, Notary Public, N. Y. Co.—[Seal].

UNITED STATES OF AMERICA, Southern District of New York, } ss.: [378

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 377 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of James L. Morgan *et al.* (four libels) against Austro-Americana Steamship Company (and four cross-libels), as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 23d day of May, in the year of our Lord one thousand nine hundred and of the Independence of the said United States the one hundred and twenty-fourth.

WM. PARKIN,
Clerk.

[SEAL.]

(Documentary stamp.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which James L. Morgan *et al.* are appellants and The Steamship "Styria," her engines, &c., Antonio G. Scopinich, claimant, is appellee, on appeal and cross-appeal, which suit was removed into the said circuit court of appeals by virtue of appeals from the district court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of October, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. 300, October term, 1900. The Steamship "Styria," &c., *vs.* James L Morgan *et al.* Writ of certiorari. United States circuit court of appeals, second circuit. Filed Nov. 19, 1900. William Parkin, clerk.

United States Circuit Court of Appeals for the Second Circuit.

ANTONIO G. SCOPINICH, Claimant of the Steamship Styria, Her Engines, etc., Appellant,
against
JAMES L. MORGAN ET AL., Appellees.

It is hereby stipulated and agreed that the transcript of record heretofore certified to the Supreme Court by the clerk of this court and filed in the office of the clerk of the Supreme Court of the United States, with the application for a writ of certiorari herein, may be taken as the return to the writ issued by said Supreme Court to said circuit court of appeals under date of the 16th of October, 1900, and that this stipulation may be certified to the Supreme Court by the clerk of this court as and for the return to the said writ.

Dated New York, October 20th, 1900.

COWEN, WING, PUTNAM & BURLINGHAM,
Proctors for James L. Morgan et al.
CONVERS & KIRLIN,
Proctors for Antonio G. Scopinich.

To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed, and under direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, November 19th, 1900.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Ten-cent U. S. internal-revenue stamp, canceled Nov. 19, 1900. C. & K.]

[Endorsed:] United States circuit court of appeals, second circuit. James L. Morgan *et al. v.* S. S. "Styria." Return to writ of certiorari.

[Endorsed:] File No., 17,785. Supreme Court U. S., October term, 1900. Term No., 300. The Steamship Styria, &c., petitioner, *vs.* James L. Morgan & *al.* Writ of certiorari and return. Filed Nov. 23, 1900.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Schuyler L. Parsons is appellant and The Steamship "Styria," her engines, &c., Antonio G. Scopinich, claimant, is appellee, on appeal and cross-appeal, which suit was removed into the said circuit court of appeals by virtue of appeals from the district court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of October, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. 301, October term, 1900. The Steamship "Styria," &c., *vs.* Schuyler L. Parsons. Writ of certiorari. United States circuit court of appeals, second circuit. Filed Nov. 16, 1900. William Parkin, clerk.

United States Circuit Court of Appeals for the Second Circuit.

ANTONIO G. SCOPINICH, Claimant of the Steamship Styria, Her Engines, etc., Appellant,
against
SCHUYLER L. PARSONS, Appellee.

It is hereby stipulated and agreed that the transcript of record heretofore certified to the Supreme Court by the clerk of this court and filed in the office of the clerk of the Supreme Court of the United States, with the application for a writ of certiorari herein, may be taken as the return to the writ issued by said Supreme Court to said circuit court of appeals under date of the 16th of October, 1900, and that this stipulation may be certified to the Supreme Court by the clerk of this court as and for the return to the said writ.

Dated New York, October 20th, 1900.

BOWERS & SANDS,
Proctors for Schuyler L. Parsons.
CONVERS & KIRLIN,
Proctors for Antonio G. Scopinich.

To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed, and under the direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, November 16, 1900.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Ten-cent U. S. internal-revenue stamp, canceled 16th Nov., 1900. C. & K.]

[Endorsed:] United States circuit court of appeals, second circuit. Schuyler L. Parsons *v.* S. S. "Styria." Return to writ of certiorari.

[Endorsed:] File No., 17,786. Supreme Court U. S., October term, 1900. Term No., 301. The Steamship "Styria," &c., petitioner, *vs.* Schuyler L. Parsons. Writ of certiorari & return. Filed Nov. 17, 1900.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Alfred L. Malcolmson is appellant and The Steamship "Styria," her engines, &c., Antonio G. Scopinich, claimant, is ap-

pellee, on appeal and cross-appeal, which suit was removed into the said circuit court of appeals by virtue of appeals from the district court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of October, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. 302, October term, 1900. The Steamship "Styria," &c., *vs.* Alfred S. Malcolmson. Writ of certiorari. United States circuit court of appeals, second circuit. Filed Nov. 19, 1900. William Parkin, clerk.

United States Circuit Court of Appeals for the Second Circuit.

ANTONIO G. SCOPINICH, Claimant of the Steamship Styria, Her Engines, etc., Appellant,
against
ALFRED L. MALCOLMSON, Appellee.

It is hereby stipulated and agreed that the transcript of record heretofore certified to the Supreme Court by the clerk of this court and filed in the office of the clerk of the Supreme Court of the United States, with the application for a writ of certiorari herein, may be taken as the return to the writ issued by said Supreme Court to said circuit court of appeals under date of the 16th of October, 1900, and that this stipulation may be certified to the Supreme Court by the clerk of this court as and for the return to the said writ.

Dated New York, October 20th, 1900.

SULLIVAN & CROMWELL,
Proctors for Alfred L. Malcolmson.
CONVERS & KIRLIN,
Proctors for Antonio G. Scopinich.

To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed, and under direction

of counsel for the appellant said stipulation is certified as a return to this writ.

New York, November 19th, 1900.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Ten-cent U. S. internal-revenue stamp, canceled Nov. 20. C. & K.]

[Endorsed:] United States circuit court of appeals, second circuit. Alfred S. Malcolmson *v.* S. S. "Styria." Return to writ of certiorari.

[Endorsed:] File No., 17,787. Supreme Court U. S., October term, 1900. Term No., 302. The Steamship "Styria," &c., petitioner, *vs.* Alfred S. Malcolmson. Writ of certiorari and return. Filed Nov. 23, 1900.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which John Munroe *et al.* are appellants and The Steamship "Styria," her engines, &c., Antonio G. Scopinich, claimant, is appellee, on appeal and cross-appeal, which suit was removed into the said circuit court of appeals by virtue of appeals from the district court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of October, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. 303, October term, 1900. The Steamship "Styria," &c., *vs.* John Munroe *et al.* Writ of certiorari. United States circuit court of appeals, second circuit. Filed Nov. 19, 1900. William Parkin, clerk.

United States Circuit Court of Appeals for the Second Circuit.

ANTONIO G. SCOPINICH, Claimant of the Steamship Styria, Her Engines, etc., Appellant,
against
JOHN MUNROE ET AL., Appellees.

It is hereby stipulated and agreed that the transcript of record heretofore certified to the Supreme Court by the clerk of this court and filed in the office of the clerk of the Supreme Court of the United States, with the application for a writ of certiorari herein, may be taken as the return to the writ issued by said Supreme Court to said circuit court of appeals under date of the 16th of October, 1900, and that this stipulation may be certified to the Supreme Court by the clerk of this court as and for the return to the said writ.

Dated New York, October 20th, 1900.

STERN & RUSHMORE,
Proctors for John Munroe et al.
CONVERS & KIRLIN,
Proctors for Antonio G. Scopinich.

To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed, and under direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, November 19th, 1900.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Ten-cent U. S. internal-revenue stamp, canceled Nov. 20, 1900. C. & K.]

[Endorsed:] United States circuit court of appeals, second circuit. John Munroe *et al. v.* S. S. "Styria." Return to writ of certiorari.

[Endorsed:] File No., 17,788. Supreme Court U. S., October term, 1900. Term No., 303. The Steamship Styria, &c., petitioner, *vs.* John Munroe *et al.* Writ of certiorari and return. Filed Nov. 23, 1900.

Petitions for Cross-writs of Certiorari.

Supreme Court of the United States.

Nos. 300, 301, 302, & 303, October Term, 1900.

JAMES L. MORGAN ET AL., Petitioners,
vs.
AUSTRO-AMERICANA STEAMSHIP COMPANY, Owner, &c.

SCHUYLER L. PARSONS, Petitioners,
vs.
SAME.

ALFRED S. MALCOMSON, Petitioner,
vs.
SAME.

JOHN MUNROE ET AL., Petitioners,
vs.
SAME.

It is hereby stipulated and agreed that the transcript of record heretofore certified to this court by the clerk of the circuit court of appeals for the second circuit and filed in the office of the clerk of this court in the suits of Antonio G. Scopinich, claimant of the steamship Styria, petitioner, against James L. Morgan and others, respondents, Nos. 300, 301, 302, and 303, October term, 1900, may be taken as the return to the cross-writ of certiorari granted by this court herein.

Dated New York, November 23d, 1900.

HARRINGTON PUTNAM,
For Morgan et al.
JOHN M. BOWERS, *For Parsons.*
W. J. CURTIS, *For Malcomson.*
MELVILLE H. REGENSBURGER,
For Munroe et al.
J. PARKER KIRLIN,
For Austro-Americana S. S. Co.

[Endorsed:] Stipulation as to returns to cross-writs of certiorari.
[Endorsed:] File No., 17,785, &c. Supreme Court U. S., October term, 1900. Term No., 300, &c. The Steamship "Styria," &c., petitioner, *vs.* Jas. L. Morgan *et al.* Stipulation as to returns to cross-writs of certiorari. Filed Nov. 24, 1900.

No. 300. 301. 302. & 303
No. 624. 625. 626. 627.
Nos. 624. 625. 626. 627.

SUPREME COURT OF THE UNITED STATES

October Term, 1899.

Brief of Coulter for Petitioner

THE STYRIA

The Steamship Styria, Antonio G. Scopinich
Claimant-Appellant

Petitioner

Filed May 28, 1900.

James L. Morgan et al.
Libelants-Appellants

The Same
against
Petitioner

Schuyler L. Parsons
Libelant-Appellant

The Same
against
Petitioner

Alfred S. Malcolmson
Libelant-Appellant

The Same
against
Petitioner

John Munroe et al.
Libelants-Appellants

PETITION FOR WRIT OF CERTIORARI

Convers & Kellen
Proctors for the Styria, Petitioner

J. Parker Kellen
Advocate

Office Supreme Court
FILED
MAY 28 1900
JAMES H. McKENNEY
Clerk

Supreme Court of the United States,

OCTOBER TERM, 1899. No. .

The Steamship "STYRIA," ANTONIO G. SCOPINICH, Claimant-Appellant,
Petitioner,
AGAINST
JAMES L. MORGAN *et al.*,
Libelants Appellants.

Notice of Motion.

THE SAME,
Petitioner,
AGAINST
SCHUYLER L. PARSONS,
Libelant-Appellant.

THE SAME,
Petitioner,
AGAINST
ALFRED S. MALCOLMSON,
Libelant-Appellant.

THE SAME,
Petitioner,

AGAINST

JOHN MUNROE *et al.*,
Libelants-Appellants.

Sirs,—Please take notice that the annexed petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit, will be presented to the Supreme Court of the United States, on May 28, 1900.

New York, May 22, 1900.

Yours, &c.,

CONVERS & KIRLIN,
Proctors for the Steamship
Styria, Petitioner.

To Messrs. COWEN, WING, PUTNAM & BURLINGHAM,
Proctors for Morgan;

" BOWERS & SANDS,
Proctors for Parsons;

" SULLIVAN & CROMWELL,
Proctors for Malcomson;

" STERN & RUSHMORE,
Proctors for Munroe.

Supreme Court of the United States,

OCTOBER TERM, 1899, No.

The Steamship "STYRIA" ANTONIO G. SCOPINICH, Claimant-Appellant,
Petitioner,

AGAINST

JAMES L. MORGAN *et al.*,
Libelants-Appellants.

THE SAME,
Petitioner,

AGAINST

SCHUYLER L. PARSONS,
Libelant-Appellant.

THE SAME,
Petitioner,

AGAINST

ALFRED S. MALCOLMSON,
Libelant-Appellant.

THE SAME,
Petitioner,

AGAINST

JOHN MUNROE *et al.*,
Libelants-Appellants.

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Antonio G. Scopinich, claimant of the Austrian steamship *Styria* respectfully shows unto the Court as follows:

I.—The cases now sought to be brought into this Court involve the determination of a carrier's duty towards a large part of the cargo of a general ship, which has become contraband of war after shipment, after signature of the bills of lading and after the clearance of the vessel for the intended voyage.

They also present for decision the question of the effect and construction of

(a) an exception in the contracts of carriage of "restraints of princes," where the cargo, because of its contraband character, has become liable to capture;

(b) a clause giving the master the right to terminate the contracts of carriage and to land and store the goods at the risk and expense of the shippers or consignees in cases where he considers it unsafe to proceed on the voyage;

(c) a clause giving the master the right to transship, where he has landed and stored contraband cargo to avoid a danger of capture;

(d) a clause limiting the ship's liability to the invoice value of the goods, in cases of a failure to deliver; and,

(e) an agreement made *inter partes*, during the pendency of the causes, providing for a certain disposal of the cargo and credit of the proceeds, which the Court, by reason of an assumed hardship on one of the parties, has refused to enforce according to its terms.

II.—The above four libels were filed June 4 and 7, 1898, in the District Court, for the Southern District of New York, against the Austrian steamship *Styria*, to recover damages for the non-delivery of 2,200 tons of sulphur (fol. 396) which had been shipped on the steamer at Port Empedocle (Girgenti), Sicily, just at the outbreak of war with Spain, on April 21, 22, 23 and 24, 1898 (fols. 393-397), and had been relanded at the port of shipment, after the signing of bills of lading and the clearance of the vessel, because the sulphur had become and then was contraband of war.

The claims under the libels were for a complete breach of the contract to carry and deliver, and the damages alleged were $69,800. The vessel was released from custody under stipulations for value in the sum of $42,500 and interest, an amount in excess of the invoice value of the goods.

III.—The answers of the claimant—similar in all the cases—admit the shipment of certain sulphur by the shippers, as alleged in the libels (but not the quantity); they admit that bills of lading were duly issued therefor; and that the sulphur was not delivered at the end of the voyage. They allege that by reason of the outbreak of war between Spain and the United States, and of the formal declaration by the Spanish Government issued April 25th (fol. 874) that sulphur was contraband of war, it became unsafe, in the master's judgment, to transport the cargo past the coast of Spain and through the

Straits of Gibraltar to New York, during hostilities; and that, accordingly, he relanded and stored the cargo at the port of shipment, on due notice to the shippers, and that he was justified, under the circumstances, in so doing (pp. 26–31).

The agreements had been made to carry *lawful*, not *contraband*, cargo, and on discovery that what all parties had supposed to be lawful cargo, was in fact contraband, or, by acts of Government, had become such, it was relanded as not that which the master had undertaken to carry.

Clauses of the bills of lading, on which the claimant also relied (fols. 31, 32, 40), were:

(*a.*) "Restraints of Princes and Rulers of People * * * excepted" (fol. 742).

(*b.*) "In case of blockade or interdict of the port of discharge, *or if*, without such blockade or interdict, *the master shall consider it unsafe for any reason*, to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe at shipper's risk and expense, and on the goods being placed in charge of any mercantile agent or of British consul, and a letter being put into the Post Office, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense and the master and owners discharged from all responsibility" (fols. 756, 757).

(*c.*) "With liberty (in event of steamer putting back to this, or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or trans-ship the goods by any other steamer" (fols. 743, 744).

The bills of lading also provided:

(*d.*) "The shipowner is not to be liable * * * in any case for more than the invoice or declared value of the goods, whichever shall be least" (fols. 40, 753, 754).

The answer further alleged that during the months of August and September the shipowner brought the sulphur forward in the *Abbazia*, another of its vessels, and delivered it to the consignees for sale, not, however, as a delivery in fulfillment of the original contracts, but under the terms and conditions of the following further contract between the parties (fol. 42), namely,

"1. The claimant shall forward the cargo landed *ex Styria*, at Port Empedocle, on the first available steamer from that port to New York, and shall deliver the same to the consignees, upon the terms, and for the freight specified in the original bills of lading, the consignees to receive the same and to pay the agreed freight on right and true delivery; *the goods upon arrival to be sold at current market rates and the proceeds, less charges incurred, to be credited on account of the damages, if any, recovered in these cases* by the libelants.

"2. The claimant shall have a lien on the portions of the cargo to be delivered to the several libelants for the respective amounts of the charges against the respective portions of the brimstone in Sicily, provided the claimant was justified in relanding and storing the cargo at Port Empedocle as and when he did. If it be held that the relanding and storage of the cargo was not justified, then the said brimstone shall be free from any lien on account of the aforesaid charges or expenses, except freight, which is provided for in paragraph first of this stipulation.

"It is the purpose and intent of this paragraph of the stipulation to provide that if the claimant was justified in relanding and storing the cargo as and when he did, he shall have a lien upon the respective consignments for their respective proportions of the charges and expenses against the same, which the libelant would have had to pay (exclusive of the charges provided for in the first paragraph of this stipulation), if they undertook to forward the cargo for their own account.

"3. This stipulation and anything done by any party under it, shall be deemed to be wholly without prejudice in the pending suits, except as herein provided.

New York, August 12, 1898."

The final allegations of the answer were that the libelants had sold the cargo pursuant to the provisions of the foregoing agreement; that the amounts realized on such sales exceeded the invoice price, which was the limit of libelants' recovery for a complete breach of the agreements to carry and deliver, and that accordingly, under the terms of the agreement of August 12th, and of the above clause (*d*) of the bills of lading, the libelants had sustained no additional damages that could be recovered in these proceedings (fols. 173, 174).

IV.—The main facts in the cases are these:

The *Styria* is an Austrian steamship owned by the Austro-Americana S. S. Co.; Burrell & Son, of Glasgow, were her managers (fols. 389, 601, 662). The voyage on which she was bound at the time of the occurrences here in controversy, was from Trieste *via* Sicilian ports to New York. Some general cargo for New York was laden at Trieste (fol. 393). The steamer sailed on her voyage from that port April 16th (fol. 391) bound for Port Empedocle (Girgenti), her second loading port, which she reached April 21st (fols. 393, 394). The loading of sulphur was begun on the same day (fol. 394). Five shippers at that place furnished for shipment about 2,200 tons of sulphur, the cargo here involved, all which was laden on the vessel on or before April 24th (fols. 395-397). Speaking from recollection, the master stated that he thought a lot of about 40 tons, the last of the shipment, was laden on April 25th (fols. 396, 397), but the log (*Morgan's Ex. A*, fols. 489, 490) contains the entry under date of April 24th, "Finished loading about noon."

All the bills of lading were signed and delivered on or before April 24th (fols. 399-404).

The steamer was cleared at the Custom House of Port Empedocle on April 24 (fol. 409). She was then free and clear, all her business with the port was finished, and she was ready to proceed on the voyage.

Meantime, unknown to the master, war had broken out between Spain and the United States.

On April 20th the President approved a joint resolution of Congress recognizing the freedom and independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces under his command to carry the resolution into effect (30 *Stat. at L.*, p. 738).

The Spanish Minister at Washington, on the same date, demanded and received his passports (*Foreign Relations*, 1898; *The Pedro*, 175 U. S., at p. 356).

On the morning of April 21st, our Minister at Madrid was informed by the Spanish Minister of Foreign Affairs that the diplomatic relations between the two governments were broken off. He was, therefore, unable to present to the Spanish Government the demand he was instructed to make that the resolutions be complied with on or before the 23d of April (*Foreign Relations*, 1898; The *Pedro*, 175 U. S., at p. 356).

Immediately on receipt of a message from our Minister, announcing the action of the Spanish Government, the Secretary of the Navy, on April 21st, instructed the Commander-in-Chief of the North Atlantic Squadron to institute a blockade of certain ports in the Island of Cuba (*Report of the Bureau of Navigation*, 1898; *Appendix*, p. 175), and on April 22d the President publicly proclaimed this blockade (30 *Statutes*, 1769).

On April 22d the first overt act of war was committed by the capture of the Spanish merchant steamship *Buena Ventura* (*The Buena Ventura*, 175 U. S., 384).

On April 25th the Queen Regent of Spain issued a decree (Rec., pp. 217-219), in which it was recited that a state of war existed between Spain and the United States, and that the treaty of peace and

friendship existing between the two countries was terminated (fol. 867). This decree further stated the principles on which the Spanish Government intended to conduct the war (fols. 868, 874), and contained the following provisions material to these cases:

"ART. V. In order to capture the enemy's ships, to *confiscate* the enemy's merchandise under their own flag, and *contraband of war under any flag*, the Royal Navy, auxiliary cruisers, and privateers, if and when the latter are authorized, will exercise the right of visit on the high seas and in the territorial waters of the enemy, in accordance with international law and any regulations which may be published for the purpose" (fol. 871).

"ART. VI. Under the denomination contraband of war, the following articles are included:

"Cannons, machine-guns, mortars, guns, all kinds of arms and fire arms, bullets, bombs, grenades, fuses, cartridges, matches, powder, *sulphur*, saltpetre, dynamite, and every kind of explosive, articles of equipment like uniforms, straps, saddles and artillery and cavalry harness, engines for ships and their accessories, shafts, screws, boilers and other articles used in the construction, repair, and arming of warships, and in general all warlike instruments, utensils, tools, and other articles, and whatever may hereafter be determined to be contraband" (fol. 872).

"ART. VIII. The Minister of State and the *Minister of Marine are charged to see the fulfillment of the present Royal Decree and to give the orders necessary for its execution*" (fol. 874).

On the same day (April 25th), the President transmitted a message to Congress, suggesting the advisability of a formal declaration of war (*Messages and Papers of the Presidents*, Vol. 10, p. 154), and thereupon the Congress passed and the President approved the following act, namely:

"AN ACT declaring that war exists between the United States of America and the Kingdom of Spain.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:*

"FIRST: That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, *anno domini* eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.

"SECOND: That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States to such extent as may be necessary to carry this Act into effect.

"Approved April 25, 1898" (30 *Stat. at Large, Pt.* 2, *Ch.* 189).

On April 23d, at 11 P. M., the master received a cablegram from his managers in Glasgow, who were better informed of the course of events than he was in Sicily, "not to sail until the receipt of further instructions" (*Morgan's Ex. A, Log, Entry of April 23d*, 1898). On the 25th he received a further message "to discharge whole cargo quickly as possible" (*Morgan's Ex. A, Log, Entry, April 25th*).

The relanding of the cargo was also in accordance with the master's own judgment, based on the information available to him in Sicily (fols. 411, 412, 413, 426, 458-60, 491-492, 493, 537). On this point he said:

"In fact I didn't bring it because I could see through the newspapers that it was contraband of war although I acted on the owner's instructions to land the goods for I would never have sailed with such a cargo because I might be caught here by the enemy—your enemies I mean (fol. 412).

"Q. Did you as a matter of fact, consider it safe to bring brimstone?

A. No, I did not think it safe. When you see in the papers the ships are stopped with sulphur you would not call it safe" (fol. 537).

The work of discharging and storing the sulphur was begun on April 27th, and was finished at noon of May 7th (fols. 437, 439; *Log, Morgan's Ex.* "*A*," *Entry* May 7th).

Prior to commencing the discharge, the master, in accordance with clause (*b*) of the bill of lading (*ante*, p. 6), sent registered letters in the following form to each of the shippers, and also to the consignees, where named:

"PORT EMPEDOCLE, 27th of April, 1898.

"On finding risky my passage to New York, with the actual sulphur cargo, for facts of war, I give you notice that I am discharging your cargo for your own account and risk, under care of the mercantile agent, Mr. William Peirce, depositing the same in the warehouses of Mr. Zenobia Urso, and if these are not sufficient, in the warehouses of the British Consulate, faculty which I have in force in the bills of lading.

"With my kindest regards, etc.,

"ANTONIO G. SCOPINICH,
"Master Austrian Steamer *Styria*"
(fol. 427).

On completion of the unloading of the sulphur, the master sent to each of the shippers a registered postal card containing the following notice:

"EMPEDOCLE, 7th May, 1898.

"Referring to my letter of the 27th last, by which I gave you notice that the parcel of sulphur loaded by you on board the Austrian steamer *Styria* for New York, is laid at the risk and expense, in the warehouses of Mr. Zenobio Urso here, and as soon as you will pay the expense here made for your account, in conformity with the bills of lading, the said sulphur will be delivered to you" (fol. 443).

On the same day he sent registered postal cards containing similar notices to such of the consignees as were named in the bills of lading (fol. 445).

The steamer was again cleared from the Custom House of Port Empedocle on May 7th, and in the early morning of the 8th she proceeded on her voyage towards New York with the cargo laden at

Trieste, but without any of the sulphur that had been shipped at Port Empedocle (fols. 535, 447, 448). Some additional cargo was shipped at Messina and Palermo. She finally left Sicily on May 9th (fol. 449).

Up to the time of the steamer's departure no official or public statement was issued under or by authority of the Spanish Government, removing sulphur from the list of contraband articles (fols. 467, 468, 469, 474, 495, 498, 499, 500, 527, 532, 533, 534, 550, 575, 579). In point of fact, the *Spanish Government never issued any official or public declaration removing sulphur from the list of contraband*, or in any manner taking it out of the scope of her proclamation of war (fols. 849, 834).

It appears, however, that on May 6th the Spanish Minister of Foreign Affairs informed the Italian and the British Ambassadors that, *as a temporary measure*, commanders of the Spanish vessels *would be* instructed to respect sulphur ships (fols. 838, 842, 863). When such orders actually *were* given, does not appear. On May 31, for the first time, the Spanish Government informed the two Ambassadors that these orders would not be changed without previous notice (fols. 843, 851). The Spanish Government refused to make any public announcement on the subject, and the master had no official information of the private agreement until after the ship's arrival in New York.

The managers of the vessel, Burrell & Son, first heard of the temporary agreement on May 10th, the English Foreign Office informing them that the Spanish Government laid stress on the fact that the arrangement was temporary only (pp. 202-203).

On May 12th, they telegraphed to the Foreign Office in London as follows:

"Referring to your telegram to us of tenth inst., it is rumoured that Spanish Government yesterday declared sulphur non-contraband, kindly wire whether temporary relaxation you reported has been made permanent or still remains temporary" (fol. 814).

And on the same day they received from the Under Secretary of State an answer saying, "No later information received" (fol. 816).

They did not learn of the promise that the temporary arrangement would not be revoked without previous notice until June 5th, after the ship's arrival in New York (fols. 821, 823, 825, 843).

There was no evidence of any opportunity to transship the cargo earlier than was done by the *Abbazia* under the stipulation of August 12th.

Shortly after the *Styria's* arrival on June 3, 1898 (fol. 448), the above libels were filed, as before stated.

The master testified that though directed by the owners to discharge the sulphur, he knew it was contraband (fols. 452, 453, 471), and that Spain so regarded it (fols. 453, 454, 473, 501); that he did not deem it safe to proceed with the sulphur (fol. 537); that without the owners' instructions he would not have sailed with it without knowing certainly that sulphur was free (fol. 502); that he knew war existed between Spain and the United States, and had heard that a blockade of New York was going on (fol. 462); that his course lay along the Spanish coast and by the Spanish lighthouses (fol. 413); that it was reported in Sicily that Spanish men-of-war were looking for ships along this coast, and that he believed the report (fols. 493, 494); that the newspapers in Sicily reported the capture of a sulphur ship (fols. 501, 523), and that up to the time he left Sicily there was no public or official declaration that sulphur had been excluded by Spain from the list of contraband goods (fols. 452, 467, 474, 499, 500, 534).

The master's testimony on these matters is undisputed.

V.—Brown, *J.*, held that the exceptions (*a*) and (*b*) of the bills of lading, quoted above (p. 6), were applicable to the case, but that the master's right under them could not be exercised without waiting a reasonable time to see whether the danger of continu-

ing the voyage with the sulphur might not be removed by negotiation between the Italian and the Spanish governments (*Opinion*, fols. 941–947); that such a reasonable time would have been until May 10th, two weeks after the discharge was begun; that the claimant could derive no advantage in the present case under the transshipment clause (*c*); that accordingly the libelants were entitled to decrees in their favor, but that under clause (*d*) their damages should be limited to the invoice value of the sulphur with the freight added (fols. 952, 1177–1179) against which should be credited, under the stipulation of August 12th, the net proceeds of the sale of the cargo, as a charge to be deducted in ascertaining such proceeds (fols. 952–953, 1178).

On this basis, decrees were entered in favor of Malcolmson for $1,186.11 (fol. 1195); of Morgan for $280.48 (fol. 1184); of Munroe for $563.99 (fol. 1201); of Parsons for $235.36 (fol. 1190); total $2,265.94.

VI.—The grounds on which the District Judge's decision proceeded, as regards *liability*, were these (p. 236):

"Though exceptions (*a*) and (*b*) above noted in the bill of lading contemplate circumstances of war and are therefore applicable in the extraordinary circumstances that arose, still the carrier is not thereby relieved from the duty of acting with reasonable prudence for the interests of all concerned. The master as the agent of all concerned is still bound to a prudent regard for the interests of the cargo, and 'must endeavor to hold the balance evenly' between ship and cargo when their interests conflict (The *Julia Blake*, 107 U. S., 418, 427–8, 431; The *Spartan*, 25 Fed., 44, 56–58; *L'Amerique*, 35 Fed., 844–5; *Cargo ex Argos*, L. R., 5 P. C., 134, 165; *Noble* v. *Jenkins* (1896), 2 Q. B., 326, 331–2).

"The sulphur being generally regarded as contraband of war, and also within the express terms of the Spanish proclamation, a voyage through the Mediterranean, past the coast of Spain and through the Straits of Gibraltar would presumably be pecuniarily dangerous to the cargo, even though the

vessel, as a neutral, might not be liable to condemnation as prize. In case of seizure, however, the shipowner would suffer from the considerable delay incident to the seizure though she were ultimately released. Except, therefore, for the negotiations immediately entered on for procuring an exception of sulphur from contraband, I have no doubt that it would have been both the right and the duty of the master for the interests of the cargo as well as of the ship, to refuse to sail with this cargo after clearing on April 24th until there was some reasonable assurance of safety. See the *San Roman*, L. R., 3 Adm. & Eccl., 583, where there was a delay of three months. The discharge and storage of the cargo, however, was an act necessarily involving considerable expense to the shipper or consignee; and before imposing such an expense upon the cargo, the master in my judgment was bound in view of the daily reports of current negotiations and the expectations of the exception of sulphur, to wait a reasonable period for satisfactory assurances in that regard.

"No doubt any delay entailed some loss upon the ship, and what should be deemed a reasonable period ought to be determined with reference to the circumstances and interests of both. But taking the circumstances altogether, I am of opinion that the commencement of the discharge on the 27th was too hasty and precipitate, and that the master was guided in that matter by the telegram from Burrell & Son, the managing agents in London, rather than by his own judgment on all the circumstances known to him at the time. Had he been left to exercise his own judgment, I do not think, upon the testimony, that he would have discharged the cargo- especially not at the time he did; and that before he left Italy, although there was no formal publication of the exception of sulphur, there were such informal assurances coming from the Spanish Government as left no reasonable apprehension of danger from sailing with a sulphur cargo.

"I must find, therefore, that the ship was not justified by clauses (*a*) and (*b*) of the bill of lading above quoted in discharging and storing the cargo on account of the shippers, as she did, between April 27th and May 7th; that by the 10th of May there was reasonable assurance that it would be safe to go on with the voyage, and that this was not an un-

reasonable time for the ship to wait under the facts and circumstances currently known in Sicily at that time. In *Noble* v. *Jenkins, supra*, the facts were otherwise (fols. 943-947)."

VII.—The measure of *damages* under the bill of lading clause (*d*) was held to be the invoice value and freight (fols. 952, 953), and was more fully dealt with by the District Judge in his opinion overruling the exceptions to the Commissioner's report in the case of Morgan (fols. 1177-1180).

The Commissioner found that there was a complete breach of contract, but that the damages were limited to the invoice value, by clause (*d*) (pp. 274-278). Against the damages so limited were to be credited the net proceeds of sale (including freight as a charge against the goods in ascertaining such net proceeds). On those principles the Commissioner stated the damages in that case as follows:

Invoice value of the consignment			$4,279 00
Proceeds of sale	$4,513 46		
Weighing	$24 40		
Freight	354 98		
		379 38	
			4,134 08
Balance			$144 92

for which, with interest, recovery was allowed (fol. 1111).

The libelant Morgan excepted to the report because:

"III.—Said Commissioner adopted an erroneous method of assessing the damages, the true measure of damages being the difference in the value of the sulphur at the time and in the place it should have been delivered, viz.: June 3d, 1898, at New York, and at the time of its actual delivery in October, 1898.

"IV.—Said Commissioner erred in holding that the clause in the bill of lading limiting liability to the invoiced or declared value of the goods was applicable to the case.

"V.—If said clause does apply, said Commissioner erred in his interpretation of it, the true meaning of the clause being that cargo owners may recover up to, but not beyond the invoice value of their goods" (fols. 1135, 1136).

The opinion of Brown, *J.*, overruling these exceptions, was as follows:

"By the contract of the bill of lading the invoice value is the basis of settlement of any loss or damage; and a construction seems to me impossible, and in fact absurd, that would call for the same payment on a partial loss as upon a complete destruction of the goods. Hence [here?] the special agreement made pending the action further limits recovery.

"No freight was due except upon delivery at New York. Clause 2 of the stipulation recognized the freight as a lien incurred and charged upon the goods by the transportation. It was immaterial whether this lien for freight was paid before or after the sale. If not paid before sale it must have been paid *out of the proceeds* of sale, and if paid by the consignee before sale, it was paid as a lien or charge incurred upon the goods, in accordance with both clauses of the stipulation and *hence to be deducted from the amount of proceeds of sale to be credited to the claimant against the whole damages, i. e., the invoice value as limited by the B/L which was adopted in the stipulation* (The *Hadji*, 18 F. R., 489; affd. 20 F. R., 875; approved in The *Lydian Monarch*, 23 F. R., 298, 300).

"There was no conversion of the goods; only a mistaken theory of the contract rights and duties. It was the owner's duty to transport the goods and the consignees to pay the freight, and that was ultimately done by each.

Commissioner's Report affirmed" (fols. 1177, 1178, 1179, 1180).

The damages in the three remaining cases were afterwards adjusted in accordance with the principles enunciated in the test case of Morgan. The decrees in all the cases amounted to $2,265.94 (*ante*, p. 15).

VIII.—The libelants appealed to the Court of Appeals on the question as to the proper measure of damages (pp. 322–325); and the claimant appealed on the merits (pp. 327–334).

The Court of Appeals reversed the decrees below, both on the merits and as to the measure of damages, and entered orders which in the result are more favorable to the libelants than the decrees below, to the extent of about $25,000, as nearly as can be stated on this record (*Opinions*, pp. 338, 263; *Orders*, pp. 365 *et seq.*).

IX.—The Court of Appeals decided that with 2,200 tons of contraband cargo, the continuation of the voyage, which would lead the ship along the coast of Spain and through the narrow Straits of Gibraltar close by the Spanish naval base, would necessarily be attended by a danger of capture, which it was the master's duty to avoid, and that accordingly under the exception of Restraints of Princes and Rulers, he was justified in landing and storing the cargo as he did on April 27th (pp. 341–345).

But the Court further held that before he sailed finally from port and on May 6th, a newspaper in Sicily printed what purported to be a telegram from the Italian Minister of Agriculture to the Chamber of Commerce at Palermo, to the effect that, at the request of the Italian Government, the Spanish Government had given notice to the commanders of its vessels to let sulphur pass free; and that, although it is undisputed that there was no official confirmation of this message, and that such orders, if given, were liable to be revoked at any moment, and that vessels or their cargoes, on voyages, would thus be liable to capture, the master was bound to rely on the correctness of the newspaper report, to reload his contraband cargo and to proceed with it, and, if captured, to look to the *Italian* Government for indemnity (pp. 346–348).

This conclusion was reached in face of the conceded facts that the *Spanish* Government

was the one that held sulphur to be contraband, and gave notice that it would be captured under whatever flag, and that the *belligerent* Government distinctly refused to modify its proclamation publicly or to make any statement or declaration which the Austrian master or shipowners, or the English managers knew of, until June 5th (fols. 811, 842, 843, 452, 467, 474, 499, 500, 534). Not until May 31st did the Spanish Government make any official promise to anybody, so far as the record discloses, that the temporary promise given to the Italian and English Ambassadors on May 6th to let sulphur pass, would not be revoked without notice and without prejudice to ships already on their voyages when the revocation took place (fols. 842, 843, 851).

The reasoning of the opinion on this branch of the case is thus stated by Lacombe, *J.* (p. 346).

"On May 25th the *Giornale di Sicilia*, a newspaper published at Palermo and which the Captain saw from day to day stated that Messina merchants had asked their Parliamentary Deputy to urge the Government to co-operate to exclude brimstone from being considered contraband. From day to day thereafter the paper was filled with reports and rumors as to the progress of this movement to secure exemption. But down to the 6th of May, not one of these reports bore the stamp of authority; no one vouched for their accuracy. The statements in the clippings from the newspaper which have been printed in the record are merely the expression of the beliefs and expectations of its correspondents in Rome, or elsewhere, furnishing copy to a paper published in a community where an intense interest was felt in having sulphur exempted. There was no reason why it should be exempted; it is a variety of merchandise such as always has been contraband, its exportation to the United States might well be considered an "aid" to Spain's enemy, no one appears to have suggested that the United States concede the same exemption. On the one hand it might be urged that it would please the government and people of Italy to grant the request, but on the other hand, in the case of merchandise so highly contraband, neither the Italian Government nor people

could justly take offense if Spain should insist on exercising the rights which international law accords to every belligerent. Enlightened by the information now made known, we can see that the hopeful prognostications of the writers for the Journal of Sicily were well founded, but there was nothing to give any such assurance at the time they appeared. We should hesitate to hold that it was the duty of a master under similar circumstances to delay action on the expectation that a belligerent would voluntarily abandon one of its weapons, on no better assurance that such action would be taken than the statements of anonymous and irresponsible contributors to a newspaper published in a community which is extremely solicitous that such action be taken.

"By May 6th, however, the situation changed. The Journal of Sicily published an official declaration from the Italian Minister of Agriculture, Industry and Commerce, as follows:

"'Chamber of Commerce, Palermo: I inform the Chamber of Commerce for the useful information of merchants, that by the decree of April 23d of the Spanish Government, are considered as contraband of war, arms, projectiles, fuses, powder, sulphur, nitre. * * * I would also state that in consequence of our request, the Spanish Government has given notice to the commanders of its vessels to let sulphur pass free. (Signed). The Minister Coeco-Ortu.'

"Here was an official declaration which the master should have accepted as sufficient. The Italian Government, through a Cabinet Minister, announces that official action has been taken by the Spanish Government, the practical result of which was to make sulphur free from capture. It matters not that the Spanish Government might thereafter reconsider this decision and direct its cruisers to seize sulphur, because it was to be assumed that cargos taken out in reliance upon the proclamation of the Italian Government would be respected. If they were not the Italian Government would have good ground for claiming indemnity from Spain, and a *casus belli* in case of its refusal.

X.--The central fact, in some degree lost sight of, in the decision is, that the *Spanish* Government created and declared the peril, while the assurances

that it had been removed, vague and uncertain as they were, came not from Spanish, but from *Italian* sources.

Such assurances were of the nature of hearsay. Naturally it was for the interest of the Italians to continue the export of their sulphur, and to create the impression that it could be done with security to the carrying vessels. All statements emanating from Italian sources must be weighed with regard to that fact. No doubt the Italian Ambassador began his negotiations promptly. But there was never, from first to last, a word of assurance of safety, coming from Spanish sources, that was communicated to the master of the *Styria*.

The first word on the subject that reached the shipowners from the Spanish Government, came on May 10th, when the Secretary of the British Embassay at Madrid telegraphed them that "orders have been given not to treat sulphur *for the present* as contraband of war." But on the same day they received a telegram from the Under Secretary of State, at the Foreign Office in London, saying,

"Spanish Government state that *decree* already issued *cannot be altered*, but that as temporary measure naval departments have been ordered not to treat sulphur as contraband of war. They *lay stress on the fact that the measure is temporary only*" (fols. 811, 842-843).

This was three days after the landing of the cargo at Port Empedocle had been completed (fol. 439), and one day after the ship had finally sailed from her last loading port in Sicily (Palermo), on May 9th (fol. 448).

If this information had been received in time, it would have fallen short of such an assurance as a carrier should have, to justify him in proceeding under such conditions with the transportation of a large mass of contraband cargo. If, with knowledge of a formal proclamation that sulphur was contraband, and of an official statement that the

Spanish Government refused to alter the decree, but merely directed, as a temporary measure, revocable at will, that sulphur should not be treated as contraband, the ship had proceeded on a voyage and the temporary order had been revoked, and the ship seized, can it be doubted that the owners of the *lawful* cargo would have had a valid claim for their damages? Could not they have justly said, "You knew sulphur was contraband; you had authority under the bill of lading to land and store it; and yet, without an assurance of safety, you took the risk of the revocation of a temporary order, and hence should pay us the damages resulting from the risk?" (*Holladay* v. *Kennard*, 12 Wall., 254).

So far as the record shows, no assurance was given by the Spanish Government that the temporary orders would not be revoked, without previous notice, until the 31st of May (fols. 842, 843, 851).

It is an important circumstance that the shippers who protested to the master against the discharge of the cargo at the port of shipment, never claimed that the reported agreement that sulphur might pass with safety was officially confirmed, and never offered to assume the risk of capture, or to give the master any indemnity against the risks incident to proceeding on the voyage with the sulphur. It is also significant that these protests, on their face, show that the shippers had no interest in the cargo, the title having apparently passed to the consignees on shipment, and that the consignees made no representations to the master on the subject. The master's counter protest served the 11th of May (fols. 893-94) shows that it was not understood, up to that date, that sulphur could be carried with safety. In point of fact, the substance of the statements in the protests of the shippers, made at the time, are no different in effect from the testimony of the master that nothing better than rumors were current up to the time he left Sicily.

The suggestion that the captain should have relied on the newspaper report of a message from the

Italian Minister of Commerce, to the effect that sulphur could go free, and should have looked to the Italian Government for indemnity in case he was captured, was not discussed in either court by counsel, but was first volunteered by the Court of Appeals in its opinion. With all submission it seems doubtful, at the least, whether there would have been the slightest ground of claim against the Italian Government on the facts assumed. It is not known, even now, whether the message quoted was genuine or not. It has never been verified. Moreover, it was not a "proclamation," as the Court calls it, nor was it in any sense "official." It was not addressed to any foreign subjects nor to the Italian people generally. It was merely a news item sent to a local body of merchants in Palermo, a different port from that where the ship lay, and was only intended, as it says, "for the useful information of merchants." Its obvious purport was simply to inform them that they might continue shipping sulphur without infringing their duties as neutrals, provided ships could be found whose owners were willing to risk capture in transporting it.

It is going too far to say that a master who is under a legal duty to avoid a risk of capture (*Holladay* v. *Kennard*, 12 Wall., 254), should base his action in assuming such a risk on an unconfirmed newspaper report, which was admittedly erroneous, if genuine, in that it omitted to state the qualification that had been privately made to the ambassadors, that the privilege was "a temporary measure" only (fols. 811, 838, 842).

The master's view of this incident was more reasonable and prudent, it is submitted, than that adopted by the Court:

"Q. But the day before you sailed, on the 7th, you did read in the papers that the Governments had come to an agreement—to an understanding? A. Yes; not to an understanding, *not to a safe understanding, but a temporary understanding*, you know.

Q. To the effect that sulphur temporarily would not be treated as contraband of war? A. Yes.

Q. In spite of the previous proclamation. That was so, was it not? A. Yes, but the papers said not officially confirmed, you see. *That meant, of course, they could withdraw it any moment*" (fols. 578, 579).

In effect the theory of the Court makes the captain assume a risk whether he brought the sulphur on or whether he stored it. If he brought it on he ran the risk of capture and of facing claims by the owners of the lawful cargo for their damages consequent on his action, and to make himself whole he is put to his doubtful action over against the Italian Government by reason of having relied on its assurances to his damage. If, however, he failed to bring the sulphur forward he subjected himself to claims as here, for this very failure, though it was necessitated by his duty to his other shippers. To put the master in a predicament from which he cannot be relieved by the exercise of the greatest prudence is most unreasonable and unfair. It is a situation which, it is believed, did not exist in this case.

Even if the master might have had a claim against the Italian Government for idemnity in case he had acted to his prejudice in reliance on the message of the Minister of Agriculture, dated May 6th, yet it was error for the Court to hold that in determining the question of his duty, the master was bound to guide his conduct with reference to such an ultimate indemnity in case his decision proved to be wrong. His obligations were to the shipowners, to the owners of the lawful cargo already on board his vessel and of that to be shipped at the other ports of loading, and to the contraband cargo.

From the finding of the Court that a risk of capture existed which it was his duty to avoid, and that, in accordance with such duty, he was justified in relanding the cargo and leaving it in store at least until its reshipment again became safe (pp. 342-344), the con-

clusion should have followed that he was not bound to reship until the circumstances that created the peril, namely, the risks arising from the existence of war, the contraband character of the sulphur, and the public proclamation of the Spanish Government of its intention to confiscate such cargo under any flag, were removed by acts and circumstances at least as formal and public and as unmistakably originating from the Spanish Government as the acts and circumstances which, admittedly, had created those risks.

It is conceded by the Court of Appeals that the provisional arrangement alluded to in the message of the Italian Minister of Agriculture, of May 6th, was subject to revocation without notice, and to the prejudice of vessels afloat at the time of such revocation, and that if the *Styria* had proceeded on the voyage with the sulphur and had been captured prior to the 31st of May, when, for the first time, the Spanish Government promised that the revocation of its orders to let sulphur pass should not be made without notice, the ship would have had no defense to the claims for damage that would have been made by the owners of the lawful cargo. As a large part of that cargo was to consist of green fruit, it is manifest that the detention necessarily incident to every case of capture, must have resulted in the complete destruction of the fruit, and that, accordingly, the claims of the owners of the lawful cargo would, in all probability, have been very large. The decision of the Court of Appeals, conceding that the ship would have been bound to pay such claims, holds her liable here for refusing to take such risks, and to rely on the Italian Government for indemnity in case of misadventure. The decision of the Court on this point appears so extraordinary, so unreasonable, and in such manifest conflict with the ordinary duties and obligations of the master of a general ship, and with the decision of this Court in the case of *Holladay* v. *Kennard* (12 Wall., 254), that this Court should correct the error.

XI.—The Court of Appeals also erred in refusing to hold that the ship was exonerated from all liability in these cases under and by virtue of clause (*b*) of the bills of lading (*ante*, p. 6), which provided that under circumstances affecting the safety of the voyage, the master in his discretion might land the goods and store them at the risk and expense of the shipper, and that the master and the owners should thereby become discharged from all responsibility.

The District Court held that this clause was applicable to the extraordinary circumstances existing in these cases, but failed to relieve the ship from liability under it, owing to an apparent misapprehension of the facts as to when the assurances were given by the Spanish Government that the temporary arrangement, to allow sulphur to pass, which was reached on May 6th, would be made permanent and would not be revoked without previous notice, which was not until May 31st (pp. 236–237).

The decision of the Court of Appeals, while reversing the decision of the District Judge, is not clear as to the effect of clause (*b*) of the bill of lading.

In one part of the opinion the Court said:

> "We do not find it necessary to discuss this branch of the case [the effect of clause (*b*)] because we find in clause (*a*) [the exception of restraints of princes] abundant authority for a refusal to carry forward the sulphur while such a condition of affairs existed as that already described as being generally known to exist when the discharge began on April 27th" (p. 342).

In the end, however, the Court of Appeals necessarily does determine that clause (*b*) was inapplicable to the case; because if it were applicable there would be no liability on the part of the ship, inasmuch as master acted in strict accordance with it, whereas the ultimate decision of the Court of Appeals is to fix a very large liability on the ship as for a breach of contract.

Under circumstances strikingly similar to those in the present case, and where the clause in question was practically indentical in form, Mathew, *J.*, in the case of *Nobel's Explosives Co.* v. *Jenkins* (1896), 2 Q. B., 943, held that the peril of capture just outside of Hong Kong on a voyage between that port and Yokohoma was within the meaning of the clause providing that if the master considered it unsafe to enter and discharge cargo at the port of destination, he might land and store the goods at any safe port, and thus be relieved from all further responsibility. It was there determined accordingly, that where such a peril of capture existed, the ship was discharged from all liability towards the goods by landing and storing them in Hong Kong under this clause.

The decision of the Court of Appeals, in practical effect, necessarily amounts to a refusal to follow Mr. Justice Mathew's decision.

It is submitted that the clause in question was applicable as the District Judge found, and that on the undisputed facts of the case, the vessel should have been relieved from all liability by the force and effect of the special clause (*b*) of the bill of lading.

XII.—The Court of Appeals committed a grave error in reversing the decision of the District Judge as to the measure of damages under the clause in the bill of lading which limited the shippers' liability to the invoice value of the goods, and under the stipulation of August 12, 1898, which provided that the net proceeds of the sale of the cargo pending the suit should be credited on the judgments recovered by the libelants, if any (*ante*, p. 7).

The District Judge held the libelants were entitled to recover "the whole damages, *i. e.*, the invoice value as limited by the bill of lading which was adopted in the stipulation" [of August 12th] (fol. 1179).

This result proceeded from the finding that there was a complete breach of the contract to carry and

deliver; that the damages for such breach were limited to the invoice value of the goods, and that against the damages so ascertained, the net proceeds of the sale of the cargo should be credited under the stipulation of August 12th (fols. 778–779). The assessment of the damages on this basis by the Commissioner was expressly approved by the Court (*Commissioner's report*, fol. 1111: *Opinion affirming report*, p. 295).

The Court of Appeals reversed this ruling and held that the forwarding of the goods under the agreement of August 12, 1898 (p. 197), had the same legal effect as though the goods had been brought forward by the carrier without the reservations and conditions embodied in that stipulation, and accordingly decided as follows:

"The measure of damages in such cases is well settled. The loss is the difference between the price the goods actually brought and the price they would have brought had they been sold on the day when they should have arived" (p. 349).

It happened that by reason of the outbreak of war there was a great demand for sulphur in June, in consequence of which the price is said to have advanced from $18.50 a ton to $30 and $35 a ton, while the price in October, when the goods were finally brought forward for sale under the terms of the stipulation of August 12th, had again fallen to the normal figure of about $18.50 a ton. The decision of the Court of Appeals, if sustained, would award damages to the libelants for the amount of such profits in excess of the invoice value to the extent, probably, of about $25,000.

In reversing the decision of the District Judge, the Court overruled a number of decisions of the District Court for the Southern District of New York and of the District of New Jersey, dealing with the invoice value clause in cases of partial loss (The *Hadji*, 18 Fed. Rep., 459; affid. in 20 Fed. Rep., 875; *Pearse* v.

Quebec S. S. Co., 24 Fed. Rep., 285; The *Lydian Monarch*, 23 Fed. Rep., 298).

The District Judge, however, did not hold that these were cases of partial loss. His decision was that the "whole damages" were recoverable by reason of the non-delivery at the end of the *Styria's* voyage, and that the proceeds of the sale of the cargo when forwarded under the stipulation by another vessel, should be looked ot only as providing a credit to be set against the damages thus ascertained (p. 295). This was the correct rule of law (*Smith* v. *Tregarthen*, 56 L. J., Q. B., 437), and was in exact accordance with the terms of the stipulation itself that "the goods upon arrival to be sold at current market rates and the proceeds, less charges incurred, to be credited on account of the damages, if any, recovered in these cases by the libelants" (fol. 788).

This petitioner applied for a rehearing in the Court of Appeals, on the ground that the decision as to the measure of damages was contrary to the terms and spirit of the stipulation of August 12th, under which the goods were brought forward for sale on the terms and conditions therein stated (*Petition*, pp. 352-359).

In view of the reservations of the stipulation it was pointed out to the Court that the intention was that the cases should be dealt with, and the damages for non-delivery, if liability was established, should be measured precisely as though the stipulation had not been made, and the cargo had not subsequently been brought forward; and that only after this had been done should the stipulation be looked at to ascertain the amount of the credit to be set against such damages.

The application for a rehearing was granted (p. 360) and a reargument was had. The opinion, filed after the reargument (pp. 363-364) reaffirmed the previous decision, holding in effect that if the cargo had not been brought forward the ship's liability would not have been limited to the invoice value of the goods

by the clause contained in the bill of lading (p. 363). It further decided that the parties did not intend, by the stipulation, that which had been explicitly provided in it, namely, that the proceeds of the sale should be credited against the judgments recovered by the libelants (p. 364).

If the Court of Appeals meant to determine, merely, that in measuring the amount of the whole damages recovered by the libelants the invoice value clause was void, it would appear that a clear error had been committed that should be corrected; while, if the decision is rested on the proposition that the stipulation, deliberately drawn and signed by five counsel, did not express the mutual intention of such counsel, clearly this Court should pronounce its judgment on the case; for it is a matter of the highest importance that the rights of parties as determined by the stipulation of their counsel, during the pendency of the trial, should be adjudged in accordance with such stipulation.

XIII.—More specific reference will now be made to the errors in the decision of the Court of Appeals on the matter of the damages.

(**a.**) The clause limiting the ship's liability to the invoice value has been adjudged to be valid by the previous decisions of this Court (*Hart* v. *Pennsylvania Railroad Co.*, 112 U. S., 331, 337; *Calderon* v. *The Atlas Steamship Co.*, 170 U. S., 272, 278).

Though it is no doubt true that this clause would not limit the damages in any case of fraud by the ship, as suggested by Lacombe, *J.* (p. 363), yet this was not such a case. It was not even a case of conversion. On this point the District Judge's conclusion was better considered. He said:

"There was no conversion of the goods, only a mistaken theory of the contract rights and duties" (fol. 1179).

If the goods had arrived and had been delivered by mistake to the wrong consignee, the clause limit-

ing the ship's liability to the invoice value would have applied. It should apply equally in a case where, from a mistaken belief as to his rights, the carrier, under such extraordinary circumstances as here existed, assumed to terminate the contract under the special clause (*b*) above referred to (*ante*, p. 6), and failed to make any delivery in performance of the original contracts. There was nothing willful or tortious in the carrier's action, much less was there any suggestion of fraud.

The four learned Judges who have heard the case have not agreed among themselves as to what the master's rights and duties really were. It cannot be said, therefore, that any mere mistake the carrier may have made was such as to vitiate the stipulation in the bill of lading limiting the ship's liability for such mistake to the invoice value of the goods.

(**b**.) The issues stated in the pleadings presented cases of *non-delivery* and liability therefor, *not of delay in delivery* and of damages for such delay.

The opinion of the Court of Appeals ignores the issues as defined and awards damages on the basis of an issue not stated by the parties and not actually tried. Not a word of evidence was taken by either party as to whether the delay that actually occurred in the arrival of the goods was reasonable or unreasonable, or was such as to give rise to any liability, if the cases had been brought to recover damages for delayed delivery.

The libels of Morgan (fol. 21) and of Malcomson (fol. 129) allege non-delivery and claim damages on that basis. The libels of Parsons (fol. 72) and of Munroe (fol. 186) both allege a conversion and claim the value of the goods.

If, as they stated, the libelants intended to claim damages for non delivery of their goods, at the end of the voyage on which the goods were shipped, such damages would be measured by the provision of the bill of lading that the ship's liability shall be limited to the invoice value of the goods.

The answers of the claimant are uniform in all the cases. They do not seek to change the theory of the actions, in consequence of the stipulation, or of any act done under it. They allege (*a*) the master's justification for his action (fols. 31-39); (*b*) the defense of restraints of princes (fol. 40); (*c*) a defense under a clause in the bill of lading providing that "the shipowner is not to be liable for any damage to any goods which are capable of being covered by insurance" (fol. 40), and then set up the defense arising under the clause (*p*) of the bill of lading that

> "The shipowner is not to be liable * * * in any case for more than the invoice or declared value of the goods, whichever shall be least."

In connection with that defense, the claimant sets out the stipulation of August 12th, alleging that the cargo has been brought forward under it and sold by the libelants, and "that libelants have realized, by the sale of the said sulphur, more than its invoice price, and that, accordingly, under the above quoted provision of the bill of lading, the libelants have not suffered any damages in the premises which are recoverable in this action" (fols. 42, 43).

It is perceived that the claimant did not consider the case, as stated in the libels, was varied in any way by the stipulation of August 12th, except that the ship thereby became entitled to be credited with the proceeds of the sale of the sulphur against the libelants' claim for non-delivery, which, it was contended, must be limited to the invoice value.

The libelants made no move to amend their pleadings after the sulphur was brought forward under the stipulation, and it was never claimed by them, at any time, that by reason of the stipulation, the nature of the actions was changed from the original claim of damages for *non-delivery*, to the theory of damages for *delay in delivery*.

The Court adverts to the fact that at the time the stipulation of August 12th was entered into the an-

swers had not been filed. This is true, but it is unimportant, because the bills of lading in most cases were annexed to the libels, and in all the cases the master had been examined, and all the bills of lading had been produced and put in evidence (fols. 400, 404), on the 8th of June (fol. 386). It is clear, therefore, that all the proctors were fully informed of the clause in the bill of lading limiting the ship's liability to the invoice value long before the stipulation was made.

It is plain that the case as defined by the issues, related solely to the ship's liability for non-delivery of the goods.

The agreement of August 12th explicitly states that:

"This stipulation and anything done by any party under it, shall be deemed to be wholly without prejudice in the pending suits except as herein provided" (fol. 791).

The provision for forwarding the cargo was defined to be for the stated purpose of converting it into cash to abide the result of the suit. The goods on arrival were to be sold at current market rates and the proceeds, less charges incurred, were to be credited on account of the damages, if any, recovered in these cases by the libelants (fols. 778, 779).

It is manifest that neither party had any thought of bringing the cargo forward except on the terms of the agreement of August 12th, and that if that arrangement had not been reached, the cargo would have remained where it was until the trial. Both parties thought they were right in their contentions in the suits, and if the *status quo* existing when the stipulation was made had continued until the trial, it seems plain that the ship's liability would have been limited to the invoice value of the goods, and that on satisfaction of decrees for that amount the title to the sulphur would have been transferred to the shipowner (*Hagerstown Bank* v. *Adams Express*

Co., 45 Penn. St., 417; *Insurance Association* v. *Armstrong*, L. R. 5 Q. B., 244; *Mobile Railway Co.* v. *Jurey*, 111 U. S., 584, 549).

This would have also been the result if the decrees had been based on a technical conversion. Payment of a judgment recovered by the plaintiff in trover for the value of the goods, or the amount which the jury awards for the value, operates to divest him of his property in the chattels converted, and to transfer his title to the defendant (*Campbell* v. *Phelps*, 1 Pick, 61; *Brinsmead* v. *Harrison*, L. R., 6 C. P., 584; *Elliott* v. *Hayden*, 104 Mass., 180; *Marsden* v. *Cornell*, 62 N. Y., 215; *Thayer* v. *Manley*, 73 N. Y., 305; *Baltimore Marine Ins. Co.* v. *Dalrymple*, 25 Md., 307; *Lovejoy* v. *Murray*, 3 Wall., 1; *Cooper* v. *Shepard*, 3 C. B., 266

It was, therefore, prejudicial to the ship for the Court to hold that the forwarding of the goods under the stipulation changed the nature of the cases from actions for non-delivery to actions for delayed delivery, because the measure of damages, as determined by the Court of Appeals, is different in the two cases, while the stipulation itself provided that nothing done under it should be prejudicial to either party.

Under the present decision the libelants may keep the proceeds of sale, which approximately equal the invoice value of the goods, and may also recover a loss of profit, which the Court says will exceed $20,000 (p. 364); while, if the shipowners had not brought the cargo along in the *Abbazia*, it seems clear that the libelants would have recovered no profits, but only the invoice value of their goods. The result reached by the Court of Appeals flows from an act done by a party under the stipulation, and hence violates the provision that "this stipulation and anything done by any party under it shall be deemed to be wholly without prejudice in the pending suits" (fol. 791).

(c.) The Court of Appeals failed to observe the spirit and the terms of the stipulation of August 12th in looking at an act done under it (the forwarding of the cargo by the *Abbazia*) as one of the material facts on which it rested the finding that the measure of damages should be the difference between the price the sulphur would have brought if sold *ex Styria* in June, and what it brought when sold *ex Abbazia* in October.

It is plain that this measure of damages could not have been adopted if the carrier had not sent the goods forward as he did under the stipulation. In view of the reservation that "this stipulation and anything done by any party under it shall be deemed to be wholly without prejudice in the pending suits" (fol. 791), the Court was bound to disregard all acts done under the stipulation until after it had determined all questions in the suits on the facts as they were before the stipulation was entered into. In other words, the Court should have closed its eyes altogether to the fact that the cargo had been forwarded, *pendente lite*, and should have determined the cases on the issues as they stood before or on August 12th, and without regard to what was done under the stipulation. That was what the stipulation meant to provide by its reservation that all acts done under it should be without prejudice. The sole intended effect of the stipulation was to provide that after the cases had been decided without regard to what was done under it, a credit of the amount of the proceeds of the sale of the cargo should be set over against any damages that the libelants should be adjudged entitled to recover on the causes of action for non-delivery as defined in the pleadings.

The objects and provisions of the stipulation were disregarded or lost sight of in the first opinion; and in the second opinion the Court bluntly refused to give effect to it, for reasons which are far from being satisfactory.

(**d.**) The Court of Appeals adopted a wrong principle, even on its own reasoning, in treating the case of non-delivery followed by the forwarding of the goods in another vessel, like a delay in carrying the cargo to destination in the original vessel, and in determining that the measure of damages in a case of transshipment is the same as in cases of delayed delivery by the same vessel (*Smith* v. *Tregarthen*, 56 L. J., Q. B., 437; 6 Asp. Mar. Cas., 137).

In that case the defendant, the master of the steamer *Carbis Bay*, lying at Wilmington, signed bills of lading for 400 bales of cotton, "shipped on board" his vessel for Liverpool. In consequence of insufficient room only 165 bales could be shipped, and the defendant directed that the 235 remaining bales be shipped by the *Wylo*, lying in the same port, and also bound for Liverpool. The *Carbis Bay* reached Liverpool on the 26th of October, and the *Wylo* on the 29th of October, and the whole 400 bales were delivered to and accepted by the holders of the bills of lading. Between the 26th and the 29th of October, the price of cotton fell, and the plaintiffs sued the defendant to recover the loss thus occasioned. Damages for loss of market by delay in delivery are not recoverable in England against carriers by sea (*The Parana*, 2 P. D., 118; 3 Asp., 399; *The Notting Hill*, 9 P. D., 105; 5 Asp., 241). It was held by Day and Wills, *JJ.*, that on the 26th of October the plaintiffs had a right of action for non-delivery; that the measure of damages was the market value of cotton on that day, and that the subsequent delivery by the *Wylo* could only be taken into account in reduction of damages.

The only difference between that case and these is that here the measure of damages for non-delivery *ex Styria* was the *invoice* value, instead of the market value. The Court of Appeals should have followed the rule of the English case, and should have held that the subsequent delivery by the *Abbazia*, October 6th, could only be taken into ac-

count in reduction of the damages which accrued June 3d for non-delivery *ex Styria*, as limited by the invoice value. That was the rule adopted by the District Judge. The proceeds of sale of the cargo *ex Abbazia* about equalled, if they did not exceed, the invoice value (fols. 1044, 1052, 1064–1065, 1111); and accordingly the libels should have been dismissed.

(e.) The reasons assigned by the Court of Appeals for its refusal to give effect to the stipulation of August 12th are insufficient.

The Court states that if the claimant had failed to bring the cargo forward the owner could have withdrawn it from the Sicilian warehouse, paying the *Styria's* lien for expenses and freight, and could have brought it forward himself or sold it in Sicily (p. 363). No doubt he might have adopted either of those courses at any time prior to the payment by the ship of final decrees for the adjudged value of the sulphur; but if he had done so, would the measure of damages have been? Not damages for delay in delivery, because the forwarding of the goods by the goods owner would not have constituted delivery by the ship in any sense. The damages recovered from the ship would have been such as the Court would have awarded for non-delivery, less what the goods owner had realized by bringing the goods forward himself (*Smith* v. *Tregarthen*, 56 L. J., Q. B., 437); and in determining the measure of the ship's liability the invoice clause would have been applied. Nothing that the libelants could have done on their own initiative would have put them in a position to recover the amount of damages the Court of Appeals has awarded in consequence of the act of the shipowner in sending the goods forward by another vessel, under the conditions and limitations of the stipulation of August 12th. This fact clearly shows that the Court has put a construction on the stipulation of August 12th, which prejudices the rights of the claimant, and

hence is contrary to the provisions of the stipulation itself.

The Court also says that the language of the stipulation does not import such a one sided agreement as would result from a construction of it which would require the damages to be assessed in accordance with its terms (p. 364). Those terms necessarily imply that in fixing the amount of the damages two steps were necessary: (1) that the ship's liability and the extent of it should first be ascertained; and that then (2) against the liability so ascertained, the consignees should credit the net amount realized on the sale of the sulphur (*Smith* v. *Tregarthen*, *supra*). This is clearly imported, also, by the language of the stipulation, where it provides that—

"The claimant shall forward the cargo landed *ex Styria* at Port Empedocle, on the first available steamer from that port to New York, and shall deliver the same to the consignees, upon the terms and for the freight specified in the original bill of lading, the consignees to receive the sum and to pay the agreed freight on right and true delivery, *the goods upon arrival to be sold at current market rates and the proceeds, less charges incurred, to be credited on account of the damages, if any, recovered by the libelants*" (fol. 788).

It is further suggested by the Court that the construction of the stipulation contended for by the claimant, would have the effect of destroying the libelants' right to relief "so that although, concededly, they have lost over $20,000 through the ship's misconduct, they cannot recover anything, while by the same stipulation the ship gives up nothing" (p. 364).

As a matter of fact, the ship "gave up" more than $5,000, under the stipulation of August 12th, in paying charges on the sulphur and the cost of reloading it and forwarding it, which was disallowed to her in the District Court. The most cursory examination of the stipulation will show that it embodies a contract based on perfectly valid considera-

tions. That the effect of the stipulation was to deprive the libelants of the right to recover profits, resulted not from the stipulation itself, but from a clause in the bill of lading (which was adopted in the stipulation) limiting the ship's liability to the invoice value, and thus rendering entirely immaterial for the purposes of the contract of carriage or of the stipulation of August 12th, any question in regard to profits (*Hart* v. *Penn. Ry.*, 112 U. S., 331, 340).

The suggestion that the construction contended for by the claimant would result in a double deduction of the invoice value (p. 364), is plainly incorrect. The real point is not a question of double deduction, but of ascertaining in the first place the measure of the ship's liability. Against that liability as finally measured, the stipulation distinctly provided that there should be a credit of the net proceeds of sale. If the Court attempted to measure the primary liability in a way that led to a duplication of the credit of the proceeds of sale, that was due to the fault of the Court in adopting a rule plainly inconsistent with the language of the stipulation, and was not due to the stipulation itself. The error of the Court was in adopting the measure of damages which it did adopt, because after measuring the damages in that way, the credit of the net proceeds of sale, as provided in the stipulation, extinguished the damages altogether—a result which the Court considered unreasonable. If the Court had adopted the proper rule for measuring the damages, as stated by the District Judge, and had then credited the proceeds of sale, as was done in the District Court (excepting a slight error in regard to the freight), a result would have been reached that would be perfectly consonant with the language of the stipulation.

XIV.—The petitioner avers that questions of gravity and importance are involved in these causes sufficient to justify the exercise of the jurisdiction vested in this Court to issue writs of *certiorari* re-

quiring causes to be brought here for review from the Circuit Court of Appeals.

The question of the effect of the exception of "restraints of princes," as applied to the transportation of goods that have become contraband after shipment has never, it is believed, been considered by this Court. The special clause (*b*) (*ante*, p. 6), commonly called the "War Clause," now in very general use in steamship bills of lading, has never been before this Court for construction. The question of the proper measure of damages, as it arises under the extraordinary circumstances of this case, involving a claim for profits due to the accidental and adventitious inflation of the price of sulphur in consequence of the unexpected outbreak of war, is also novel in this Court. Finally, it is important that the differences of view between the Court of Appeals for the Second Circuit and the District Courts of the Second and Third Circuits in regard to the invoice value clause in bills of lading should receive consideration.

No prejudice can result to any of the parties in interest by reason of the allowance of the writ, as all parties are fully secured by bonds which carry interest.

XV.—Your petitioner presents herewith a certified copy of the transcript of record returned from the District Court to the United States Circuit Court of Appeals for the Second Circuit, and of the record in the last named Court.

Wherefore, your petitioner prays that this Honorable Court will cause the writ of *certiorari* to be issued pursuant to the power vested in this Court by the judiciary act approved March 3, 1881, requiring the said United States Circuit Court of Appeals, for the Second Circuit, to certify the whole record and cause to this Court for consideration, and that there-

upon this Court will decide the whole matter in controversy between the parties.

And your petitioner will ever pray, &c.

ANTONIO G. SCOPINICH,
Petitioner,
By CONVERS & KIRLIN,
his Proctors.

STATE OF NEW YORK, }
County of New York. } ss.:

E. B. CONVERS, being duly sworn, makes oath and says: That he is one of the procters for the petitioner herein; that he has read the foregoing petition, and that the same is true to the best of his knowledge, information and belief; and that the reason why this petition is not verified by the petitioner is that the petitioner is absent at sea, and that the owner of the *Styria* is an Austrian corporation, and has no officer or agent in this country. He further says that this petition is made and presented by due authority, and that the application is meritorious, and is not made for the purpose of delay.

E. B. CONVERS.

Subscribed and sworn to }
before me, this 25th }
day of May, 1900. }

JAMES T. KILBRETH,
Notary Public,
[SEAL.] New York County.

I hereby certify that I have examined the foregoing petition, and that, in my opinion, it is well founded, and is entitled to the favorable consideration of the Court.

J. PARKER KIRLIN,
Advocate.

Nos. 72, 73, 74 & 75

Office Supreme Court U.S.
FILED
NOV 22 1901
JAMES H. McKENNEY,
Clerk.

Brf. of Kirlin for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

Nos. 72, 73, 74, 75

Filed Nov 22, 1901.

THE STYRIA

The Steamship Styria, Antonio G. Scopinich
Claimant-Appellant
Petitioner
against
James L. Morgan et al.
Libelants-Appellants

The Same
Petitioner
against
Schuyler L. Parsons
Libelant-Appellant

The Same
Petitioner
against
Alfred S. Malcolmson
Libelant-Appellant

The Same
Petitioner
against
John Munroe et al.
Libelants-Appellants

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF FOR THE STYRIA

CONVERSE & KIRLIN
Proctors for the Petitioner

J. PARKER KIRLIN
CHARLES R. HICKOX
Of Counsel

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OCTOBER TERM, 1901.

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AUSTRO-AMERICANA S. S. Co., Appellee, AGAINST 3,250 CANTARS OF BRIMSTONE, owned by JAMES L. MORGAN *et al.*, *ex Abbazzia*, Petitioners.	
The Steamship "STYRIA," ANTONIO G. SCOPINICH, Claimant-Petitioner, AGAINST SCHUYLER L. PARSONS, Libelant-Appellee.	No. 73.

AUSTRO-AMERICANA S. S. Co.,
Appellee,

AGAINST

4,550 CANTARS OF BRIMSTONE, owned by SCHUYLER L. PARSONS *ex Abazzia*,
Petitioners.

The Steamship "STYRIA," ANTONIO G. SCOPINICH,
Claimant-Petitioner,

AGAINST

ALFRED S. MALCOLMSON,
Libelant-Appellee.

No. 74.

AUSTRO-AMERICANA S. S. Co.,
Appellee,

AGAINST

1,500 TONS BRIMSTONE, owned by MALCOLMSON *ex* S. S. *Abazzia*,
Petitioners.

The Steamship "STYRIA," ANTONIO G. SCOPINICH,
Claimant-Petitioner,

AGAINST

JOHN MUNROE *et al.*,
Libelants-Appellees.

No. 75.

AUSTRO-AMERICANA S. S. Co.,
Appellee,

AGAINST

100 TONS BRIMSTONE, owned by JOHN MUNROE *et al.*, *ex Abazzia*,
Petitioners.

BRIEF FOR THE "STYRIA" AND THE AUSTRO-AMERICANA S. S. CO.

THE PLEADINGS.

The above four libels against the Austrian Steamship *Styria* were filed June 4 and 7, 1898, in the District Court, for the Southern District of New York, to recover damages for the non-delivery of 2,200 tons of sulphur (fol. 396) which had been shipped on the steamer at Port Empedocle (Girgenti), Sicily, on April 21, 22, 23 and 24, 1898, just at the outbreak of war between the United States and Spain (fols. 393-397), and had been relanded at the port of shipment, after the signing of bills of lading and the clearance of the vessel, because the sulphur had become and then was contraband of war.

The claim under each libel was for a complete breach of the contract to carry and deliver, and the damages alleged were $69,800. Two of the libels allege a conversion of the sulphur (*Parsons*, fol. 72; *Munroe*, fol. 186); the other two allege non-delivery (*Malcomson*, fol. 129; *Morgan*, fol. 21). The vessel was released from custody under stipulations for value in the sum of $42,500 and interest, an amount in excess of the invoice value of the goods.

The answers of the claimant are similar in all the cases. They admit the shipment of certain sulphur by the shippers, as alleged in the libels (but not the quantity); that bills of lading were duly issued

therefor; and that the sulphur was not delivered at the end of the voyage. They allege that by reason of the outbreak of war between Spain and the United States, and of the formal declaration by the Spanish Government issued April 25th (fol. 874) that sulphur was contraband of war, it became unsafe, in the master's judgment, to transport the cargo past the coast of Spain and through the Straits of Gibraltar to New York, during hostilities, and that, accordingly, he relanded and stored the cargo at the port of shipment on due notice to the shippers, and that he was justified under the circumstances in so doing. They further alleged that the master's act was authorized by the provisions of the bills of lading (fols 101-124).

The clauses in the bills of lading, on which the claimant relied (fols. 31, 32, 40), were these:

(*a.*) "Restraints of Princes and Rulers of People * * * excepted" (fol. 472).

(*b.*) "In case of blockade or interdict of the port of discharge, or if, without such blackade or interdict, the master shall consider it unsafe for any reason, to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe at shipper's risk and expense, and on the goods being placed in charge of any mercantile agent or of British Consul, and a letter being put into the Post Office, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense and the master and owners discharged from all responsibility" (fols. 756, 757).

(*c.*) "With liberty (in event of steamer putting back to this, or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or trans-ship the goods by any other steamer" (fols. 743, 744).

The bills of lading also provided:

(*d.*) "The shipowner is not to be liable * * * in any case for more than the invoice or declared value of the goods, whichever shall be least" (fols. 40, 753, 754).

The answers further alleged that during the months of August and September the shipowner brought the sulphur forward in the *Abbazia*, another of its vessels, and delivered it to the consignees under the terms of a stipulation which was agreed to by all the parties to these actions (fol. 42). This stipulation is given in full at page 13 of this brief.

The final allegations of the answers were that the libelants had sold the cargo pursuant to the provisions of the foregoing stipulation; that the amounts realized on such sales exceeded the invoice price, and that accordingly, under the terms of the stipulation, and of the above clause (*d*) of the bill of lading, the libelants had sustained no damages which could be recovered in these proceedings (fols. 173, 174).

The four cross-libels against the consignments of sulphur were filed by the shipowner to recover the expenses incurred in the performance of the stipulation of August 12, 1898 (*post*, p. 13). It was provided, in the second paragraph of the stipulation, that the shipowner should have a lien on the cargo for these expenses in addition to the lien for freight (fols. 789–792).

The answers of the claimants in these cases questioned the right of the master of the *Styria* to reland the cargo originally, and denied that the expenses incident to bringing it forward by the *Abbazia* were properly chargeable to the cargo (fols. 266–271, 290–311, 329–340, 357–369.

The Facts.

The *Styria* is an Austrian steamship owned by the Austro-Americana S. S. Co.; Burrell & Son, of

Glasgow, were her managers (fols. 389, 601, 662). The voyage on which she was bound at the time of the occurrences here in controversy, was from Trieste *via* Sicilian ports to New York. Some general cargo for New York was laden at Trieste (fol. 393). The steamer sailed on her voyage from that port April 16, 1898 (fol. 391), bound for Port Empedocle (Girgenti), her second loading port, which she reached April 21st (fols. 393, 394). The loading of sulphur was begun on the same day (fol. 394). Five shippers at that place furnished for shipment about 2,200 tons of sulphur, the cargo here involved, all which was laden on the vessel on or before April 24th (fols. 395–397). Speaking from recollection, the master stated that a lot of about 40 tons, the last of the shipment, was laden on Sunday, which he thought was April 25th (fols. 396, 397). Sunday, however, was the 24th of April.

All the bills of lading were signed and delivered on or before April 24th (fols. 399–404).

The steamer was cleared at the Custom House of Port Empedocle on April 24th (fol. 409). She was then free and clear, all her business with the port was finished, and she was ready to proceed on the voyage.

Meantime, unknown to the master, war had broken out between Spain and the United States.

On April 20th the President approved a joint resolution of Congress recognizing the freedom and independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces under his command to carry the resolution into effect (30 *Stat. at L.*, p. 738).

The Spanish Minister at Washington, on the same date, demanded and received his passports (*Foreign Relations*, 1898; *The Pedro*, 175 U. S., at p. 356).

On the morning of April 21st, our Minister at Madrid was informed by the Spanish Minister of Foreign Affairs that diplomatic relations between the two governments were broken off. He was, therefore, unable to present to the Spanish Government the demand he was instructed to make that the resolutions be complied with on or before the 23d of April (*Foreign Relations*, 1898; The *Pedro*, 175 U. S., at p. 356).

Immediately on receipt of a message from our Minister, announcing the action of the Spanish Government, the Secretary of the Navy, on April 21st, instructed the Commander-in-Chief of the North Atlantic Squadron to institute a blockade of certain ports in the Island of Cuba (*Report of the Bureau of Navigation*, 1898; *Appendix*, p. 175), and on April 22d the President publicly proclaimed this blockade (30 *Statutes*, 1769).

On April 22d the first overt act of war was committed by the capture of the Spanish merchant steamship *Buena Ventura* (*The Buena Ventura*, 175 U. S., 384).

On April 25th the Queen Regent of Spain issued a decree (Rec., pp. 217–219), in which it was recited that a state of war existed between Spain and the United States, and that the treaty of peace and friendship existing between the two countries was terminated (fol. 867). This decree further stated the principles on which the Spanish Government intended to conduct the war (fols. 868, 874), and contained the following provisions material to these cases:

"ART. V. In order to capture the enemy's ships, to *confiscate* the enemy's merchandise under their own flag, and *contraband of war under any flag*, the Royal Navy, auxiliary cruisers and privateers, if and when the latter are authorized, will exercise the right of visit on the high seas and in the territorial waters of the enemy, in accordance with international law and any regulations which may be published for the purpose" (fol. 871).

"ART. VI. Under the denomination contraband of war, the following articles are included:

"Cannons, machine-guns, mortars, guns, all kinds of arms and fire arms, bullets, bombs, grenades, fuses, cartridges, matches, powder, *sulphur*, saltpetre, dynamite, and every kind of explosive, articles of equipment like uniforms, straps, saddles and artillery and cavalry harness, engines for ships and their accessories, shafts, screws, boilers and other articles used in the construction, repair, and arming of warships, and in general all warlike instruments, utensils, tools, and other articles, and whatever may hereafter be determined to be contraband" (fol. 872).

"ART. VIII. The Minister of State and the *Minister of Marine are charged to see the fulfillment of the present Royal Decree and to give the orders necessary for its execution*" (fol. 874).

On the same day (April 25th), the President transmitted a message to Congress, suggesting the advisability of a formal declaration of war (*Messages and Papers of the Presidents*, Vol. 10, p. 154). The Congress thereon passed and the President approved the following act:

"AN ACT declaring that war exists between the United States of America and the Kingdom of Spain.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:*

"FIRST: That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, *anno domini* eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.

"SECOND: That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States

the militia of the several States to such extent as may be necessary to carry this Act into effect.

"Approved April 25, 1898" (*30 Stat. at Large, Pt. 2, Ch. 189*).

When it became known that a state of war actually existed between Spain and the United States, the managing owners, on or before April 26th, telegraphed to the master to discharge the sulphur (fols. 412, 495, 515).

The relanding of the cargo was also in accordance with the master's own judgment, based on the information available to him in Sicily (fols. 411, 412, 413, 426, 458-60, 491-492, 493, 537). He says that he knew it was contraband (fols. 452, 453, 471), and that Spain so regarded it (fols. 453, 454, 473, 501); that he did not deem it safe to proceed with the sulphur (fol. 537); that without the owners' instructions he would not have sailed with it without knowing certainly that sulphur was free (fol. 502); that he knew war existed between Spain and the United States, and had heard that a blockade of New York was going on (fol. 462); that his course lay along the Spanish coast and by the Spanish lighthouses (fol. 413); that it was reported in Sicily that Spanish men-of-war were looking for ships along this coast, and that he believed the report (fols. 493, 494); that the newspapers in Sicily reported the capture of a sulphur ship (fols. 501, 523), and that up to the time he left Sicily there was no public or official declaration that sulphur had been excluded by Spain from the list of contraband goods (fols. 452, 467, 474, 499, 500, 534).

The master's testimony as to these matters is undisputed.

He further said:

"In fact I didn't bring it because I could see through the newspapers that it was contraband of war although I acted on the owner's instructions to land the goods for I would never have sailed with

such a cargo because I might be caught here by the enemy—your enemies I mean (fol. 412).

"Q. Did you as a matter of fact, consider it safe to bring brimstone?

A. No, I did not think it safe. When you see in the papers the ships are stopped with sulphur you would not call it safe" (fol. 537).

The work of discharging and storing the sulphur was begun on April 29th, and was finished at noon of May 7th (fols. 437, 439).

Prior to commencing the discharge, the master, in accordance with clause (*b*) of the bill of lading (*ante*, p. 4), sent registered letters in the following form to each of the shippers, and also to the consignees, where na ned:

"PORT EMPEDOCLE, 27th of April, 1898.

"On finding risky my passage to New York with the actual sulphur cargo, for facts of war, I give you notice that I am discharging your cargo for your account and risk, under care of the mercantile agent, Mr. William Pierce, depositing the same in the warehouses of Mr. Zenobia Urso, and if these are not sufficient, in the warehouses of the British Consulate, faculty which I have in force in the bills of lading.

"With my kindest regards, &c.,

ANTONIO G. SCOPINICH,

"Master Austrian Steamer *Styria*"

(fol. 427).

On completion of the unloading of the sulphur, the master sent to each of the shippers a registered postal card containing the following notice:

"EMPEDOCLE, 7th May, 1898.

"Referring to my letter of the 27th last, by which I gave you notice that the parcel of sulphur loaded by you on board the Austrian steamer *Styria* for New York, is laid at the risk and expense, in the

warehouses of Mr. Zenobio Urso here, and as soon as you will pay the expense here made for your account, in conformity with the bills of lading, the said sulphur will be delivered to you" (fol. 443).

On the same day he also sent registered postal cards containing similar notices to such of the consignees as were named in the bills of lading (fol. 445).

The *Styria* was again cleared from the Custom House of Port Empedocle on May 7th, and on the early morning of the 8th she proceeded on her voyage to New York with such cargo as she had laden at Trieste, but without any of the sulphur that had been shipped at Port Empedocle (fols. 535, 447, 448).

Additional cargo, consisting of about 40,000 boxes of fruit (fols. 480, 518) was shipped at Messina and Palermo. She finally left Sicily on May 9 (fol. 448).

The libelants contended in the Courts below, that on or before that date, an arrangement had been reached between Spain and Italy under which it would have been safe and prudent for the master to have proceeded with the sulphur on board, that he had read reports of this fact in a certain Sicilian newspaper, and was bound to act on it.

The evidence was undisputed that up to the time of the steamer's departure no official or public statement had been issued under or by authority of the Spanish Government removing sulphur from the list of contraband articles (fols. 467, 468, 469, 474, 495, 498, 499, 500, 527, 532, 533, 534, 550, 575, 579). In point of fact, the *Spanish Govment never issued any official or public declaration removing sulphur from the list of contraband*, or in any manner taking it out of the scope of her proclamation of war (fols. 849, 834).

It appears, however, from letters from the British Foreign Office at London, dated July 8, 1898, and July 13 respectively (fols. 837–840, 841–845), that on

May 6 the Spanish Minister of Foreign Affairs informed the Italian and the British Ambassadors that, *as a temporary measure*, commanders of the Spanish vessels *would be* instructed to respect sulphur ships. When such orders actually *were* given does not appear. On May 31, for the first time, the Spanish Government informed the two Ambassadors that these orders would not be changed without previous notice (fols. 843, 851). The Spanish Government refused to make any public announcement on the subject, and the master had no official information of the private agreement until after the ship's arrival in New York.

The managers of the vessel, Burrell & Son, first heard of the temporary agreement on May 10th, when the English Foreign Office informed them that the Spanish Government laid stress on the fact that the arrangement was temporary only (fols. 805–811).

On May 12th Burrell & Son telegraphed to the Foreign Office in London as follows:

"Referring to your telegram to us of tenth inst., it is rumored that Spanish Government yesterday declared sulphur non-contraband, kindly wire whether temporary relaxation you reported has been made permanent or still remains temporary" (fol. 814).

And on the same day they received from the Under Secretary of State an answer saying, "No later information received" (fol. 816).

They did not learn of the promise that the temporary arrangement would not be revoked without previous notice until June 5th, after the ship's arrival in New York (fols. 821, 823, 825, 843).

Shortly after the *Styria's* arrival on June 3, 1898 (fol. 448), the above libels against the vessel were filed, as before stated.

The Peace Protocol between Spain and the United States was signed August 12, 1898. Negotiations looking to the forwarding of the cargo, which had

been pending some time, were concluded on August 22d, and embodied in the following stipulation (*Styria's* Ex. C):

"1. The claimant shall forward the cargo landed ex *Styria*, at Port Empedocle, on the first available steamer from that port to New York, and shall deliver the same to the consignees, upon the terms, and for the freight specified in the original bills of lading, the consignees to receive the same and to pay the agreed freight on right and true delivery; the goods upon arrival to be sold at current market rates and the proceeds, less charges incurred, to be credited on account of the damages, if any, recovered in these cases by the libelants.

"2. The claimant shall have a lien on the portions of the cargo to be delivered to the several libelants for the respective amounts of the charges against the respective portions of the brimstone in Sicily, provided the claimant was justified in relanding and storing the cargo at Port Empedocle as and when he did. If it be held that the relanding and storage of the cargo was not justified, then the said brimstone shall be free from any lien on account of the aforesaid charges or expenses, except freight, which is provided for in paragraph first of this stipulation.

"It is the purpose and intent of this paragraph of the stipulation to provide that if the claimant was justified in relanding and storing the cargo as and when he did, he shall have a lien upon the respective consignments for their respective proportions of the charges and expenses against the same, which the libelant would have had to pay (exclusive of the charges provided for in the first paragraph of this stipulation), if they undertook to forward the cargo for their own account.

"3. This stipulation and anything done by any party under it, shall be deemed to be wholly without prejudice in the pending suits, except as herein provided.

New York, August 12, 1898" (fol. 785).

Pursuant to this agreement, the shipowners forwarded the cargo in their steamship *Abazzia*, which sailed from Port Empedocle, September 4th (*Thianich*, fol. 618), and arrived in New York, Septem-

ber 30th (*Thianich*, fol. 648). The sulphur was thereon delivered to the consignees, who accepted it and paid the freight stipulated for in the *Styria's* bills of lading.

The *Abazzia* was detained at Girgenti from the 24th to the 29th of August, owing to the fact that the shippers for whose account the sulphur had been landed from the *Styria* either were not informed of the agreement to forward it, or were uninstructed as to their duty in the premises, and declined to assist in obtaining its release (*Thianich*, fols. 603, 606, 615). Damages are claimed for this detention. The expenses of relanding the cargo from the *Styria*, of reloading it on the *Abazzia*, and all incidental expenses except the storage, were paid by the shipowners, and are proved in the depositions of Scopinich and Thianich (pp. 138–143, 155–157). The storage charge, in accordance with the custom a Girgenti, was taken by the storehouse keeper in kind. One per cent. of the sulphur was kept by him for his charges (fols. 627, 628).

There was no evidence of any opportunity to transship the cargo earlier than was done by the *Abbazia* under the stipulation of August 12th.

The Decisions.

Brown, *J.*, in the District Court held that the exceptions (*a*) and (*b*) of the bills of lading, quoted above, were applicable to the case, but that the master's right under them could not be exercised without waiting a reasonable time to see whether the danger of continuing the voyage with the sulphur might not be removed by negotiation between the Italian and the Spanish governments (*Opinion*, fols. 941–947); that such a reasonable time would have been two weeks after the discharge was begun, or until May 10th; that the claimant could derive no advantage in the present case under the transshipment clause (*c*); that accordingly the libelants were entitled to de-

crees in their favor; but that under clause (*d*) their damages should be limited to the invoice value of the sulphur with the freight added (fols. 952, 1177-1179), against which should be credited, under the stipulation of August 12th, the net proceeds of the sale of the cargo. He further held that the freight and the cost of weighing should be deducted from the proceeds of sale as a "charge," under the stipulation, in determining the amount of the proceeds (fols. 952-953, 1178).

On this basis, decrees were entered in favor of Malcolmson for $1,186.11 (fol. 1195); of Morgan for $280.48 (fol. 1184); of Munroe for $563.99 (fol. 1201); of Parsons for $235.36 (fol. 1190); total $2,265.94.

The grounds on which the District Judge's decision proceeded, as regards *liability*, were these (p. 236):

"Though exceptions (*a*) and (*b*) above noted in the bill of lading contemplate circumstances of war and are therefore applicable in the extraordinary circumstances that arose, still the carrier is not thereby relieved from the duty of acting with reasonable prudence for the interests of all concerned. The master as the agent of all concerned is still bound to a prudent regard for the interests of the cargo, and 'must endeavor to hold the balance evenly' between ship and cargo when their interests conflict (The *Julia Blake*, 107 U. S., 418, 427-8, 431; The *Spartan*, 25 Fed., 44, 56-58; *L'Amerique*, 35 Fed., 844-5; *Cargo ex Argos*, L. R., 5 P. C., 134, 165; *Nobel* v. *Jenkins* (1896), 2 Q. B., 326 331-2).

"The sulphur being generally regarded as contraband of war, and also within the express terms of the Spanish proclamation, a voyage through the Mediterranean, past the coast of Spain and through the Straits of Gibraltar would presumably be pecuniarily dangerous to the cargo, even though the vessel, as a neutral, might not be liable to condemnation as prize. In case of seizure, however, the shipowner would suffer from the considerable delay incident to the seizure though she were ultimately released. Except, therefore, for the negotiations immediately entered on for procuring an exception of sulphur from contraband I have no doubt that it would have been both the right and

the duty of the master for the interests of the cargo as well as of the ship, to refuse to sail with this cargo after clearing on April 24th until there was some reasonable assurance of safety. See the *San Roman*, L. R., 3 Adm. & Eccl., 583, where there was a delay of three months. The discharge and storage of the cargo, however, was an act necessarily involving considerable expense to the shipper or consignee; and before imposing such an expense upon the cargo, the master in my judgment was bound in view of the daily reports of current negotiations and the expectations of the exception of sulphur, to wait a reasonable period for satisfactory assurances in that regard.

"No doubt any delay entailed some loss upon the ship, and what should be deemed a reasonale period ought to be determined with reference to the circumstances and interests of both. But taking the circumstances altogether, I am of opinion that the commencement of the discharge on the 27th was too hasty and precipitate, and that the master was guided in that matter by the telegram from Burrell & Son, the managing agents in London, rather than by his own judgment on all the circumstances known to him at the time. Had he been left to exercise his own judgment, I do not think, upon the testimony, that he would have discharged the cargo--especially not at the time he did; and that before he left Italy, although there was no formal publication of the exception of sulphur, there were such informal assurances coming from the Spanish Government as left no reasonable apprehension of danger from sailing with a sulphur cargo.

"I must find, therefore, that the ship was not justified by clauses (*a*) and (*b*) of the bill of lading above quoted in discharging and storing the cargo on account of the shippers, as she did, between April 27th and May 7th; that by the 10th of May there was reasonable assurance that it would be safe to go on with the voyage, and that this was not an unreasonable time for the ship to wait under the facts and circumstances currently known in Sicily at that time. In *Nobel* v. *Jenkins*, *supra*, the facts were otherwise (fols. 943-947)."

Judge Brown was further of the opinion that the transshipment clause (c) might be regarded as appli-

cable to the case, "though without advantage in the result to the defendant, since the defendant would, under this clause alone, stand chargeable with all the expenses of discharge, storage and reloading" (fol. 948).

The measure of *damages* under the bill of lading clause (*d*) was held to be the invoice value and freight (fols. 952, 953), and was more fully dealt with by the District Judge in his opinion overruling the exceptions to the Commissioner's report in the cases of Morgan (fols. 1177–1180).

The Commissioner found that there was a complete breach of contract, but that the damages were limited to the invoice value, by clause (*d*) (fols. 1093–1112). Against the damages so limited were to be credited the net proceeds of sale (including freight as a charge against the goods in ascertaining such net proceeds). On those principles the Commissioner stated the damages in Morgan's case as follows:

Invoice value of the consignment			$4,279 00
Proceeds of sale		$4,513 46	
Weighing	$24 40		
Freight	354 98		
		379 38	
			4,134 08
Balance			$144 92

for which, with interest, recovery was allowed (fol. 1111).

The libelant Morgan excepted to the report because:

"III.—Said Commissioner adopted an erroneous method of assessing the damages, the true measure of damages being the difference in the value of the sulphur at the time and in the place it should have been delivered, viz.: June 3d, 1898, at New York, and at the time of its actual delivery in October, 1898.

"IV.—Said Commissioner erred in holding that the clause in the bill of lading limiting liability to the invoiced or declared value of the goods was applicable to the case.

"V.—If said clause does apply, said Commissioner erred in his interpretation of it, the true meaning of the clause being that cargo owners may recover up to, but not beyond the invoice value of their goods" (fols. 1135, 1136).

The opinion of Brown, *J.*, overruling these exceptions, was as follows:

"By the contract of the bill of lading the invoice value is the basis of settlement of any loss or damage; and a construction seems to me impossible, and in fact absurd, that would call for the same payment on a partial loss as upon a complete destruction of the goods. Hence [here*t*] the special agreement made pending the action further limits recovery.

"No freight was due except upon delivery at New York. Clause 2 of the stipulation recognized the freight as a lien incurred and charged upon the goods by the transportation. It was immaterial whether this lien for freight was paid before or after the sale. If not paid before sale it must have been paid *out of the proceeds* of sale, and if paid by the consignee before sale, it was paid as a lien or charge incurred upon the goods, in accordance with both clauses of the stipulation and *hence to be deducted from the amount of proceeds of sale to be credited to the claimant against the whole damages, i. e., the invoice value as limited by the B/L which was adopted in the stipulation* (The *Hadji*, 18 F. R., 489; affd. 20 F. R., 875; approved in The *Lydian Monarch*, 23 F. R., 298, 300).

"There was no conversion of the goods; only a mistaken theory of the contract rights and duties. It was the owner's duty to transport the goods and the consignee's to pay the freight, and that was ultimately done by each.

"Commissioner's report affirmed" (fols. 1177, 1178, 1179, 1180).

The damages in the three remaining cases were afterwards adjusted in accordance with the principles enunciated in the test case of Morgan. The decrees in all the cases amounted to $2,265.94 (*ante*, p. 15).

The four cross libels were dismissed, with costs (pp. 239, 240, 241, 242).

The libelants appealed to the Court of Appeals on the question as to the proper measure of damages (pp. 322-325); the claimant and cross libelant appealed on the merits, and also on the question as to the proper measure of damages, claiming that freight should not have been deducted (fols. 1305-1335).

The Court of Appeals reversed the decrees below, both on the merits and as to the measure of damages, and entered orders which in the result are more favorable to the libelants than the decrees below, to the extent of over $20,000 (*Opinions*, pp. 349, 350, 363, 364; *Orders*, pp. 365 *et seq.*).

The Court of Appeals decided that with 2,200 tons of contraband cargo, the continuation of the voyage which would lead the ship along the coast of Spain and through the narrow Straits of Gibraltar close by the Spanish naval base, would necessarily be attended by a danger of capture, which it was the master's duty to avoid, and that accordingly under the exception of "Restraints of Princes and Rulers," he was justified in landing and storing the cargo as he did on April 27th (pp. 341-345).

But the Court further held that before he sailed finally from port and on May 6th, a newspaper in Sicily printed what purported to be a telegram from the Italian Minister of Agriculture to the Chamber of Commerce at Palermo, to the effect that, at the request of the Italian Government, the Spanish Government had given notice to the commanders of its vessels to let sulphur pass free; and that, although it is undisputed that there was no official confirmation of this message, and that such orders, if given, were liable to be revoked at any moment, and that vessels or their cargoes, on voyages, would thus be liable to capture, the master should have accepted this newspaper report as suffi-

cient, and should have reloaded and proceeded with the contraband cargo.

The Court adds that if the *Styria* had been captured "the Italian Government would have good ground for claiming indemnity from Spain, and a *casus belli* in case of its refusal" (pp. 347, 348).

How this would benefit the Austrian shipowner, or the owners of the non-contraband cargo, the decision does not state.

The reasoning of the opinion on this branch of the case is thus stated by Lacombe, *J.* (p. 346).

"On May 25th the *Giornale di Sicilia*, a newspaper published at Palermo and which the Captain saw from day to day stated that Messina merchants had asked their Parliamentary Deputy to urge the Government to co-operate to exclude brimstone from being considered contraband. From day to day thereafter the paper was filled with reports and rumors as to the progress of this movement to secure exemption. But down to the 6th of May, not one of these reports bore the stamp of authority; no one vouched for their accuracy. The statements in the clippings from the newspaper which have been printed in the record are merely the expression of the beliefs and expectations of its correspondents in Rome, or elsewhere, furnishing copy to a paper published in a community where an intense interest was felt in having sulphur exempted. There was no reason why it should be exempted; it is a variety of merchandise such as always has been contraband, its exportation to the United States might well be considered an "aid" to Spain's enemy, no one appears to have suggested that the United States concede the same exemption. On the one hand it might be urged that it would please the Government and people of Italy to grant the request, but on the other hand, in the case of merchandise so highly contraband, neither the Italian Government nor people could justly take offense if Spain should insist on exercising the rights which international law accords to every belligerent. Enlightened by the information now made known, we can see that the hopeful prognostications of the writers for the Journal of Sicily were well founded, but there was nothing to give any such assurance at the time they appeared. We should hesitate to hold that it

was the duty of the master under similar circumstances to delay action on the expectation that a belligerent would voluntarily abandon one of its weapons, on no better assurance that such action would be taken than the statements of anonymous and irresponsible contributors to a newspaper published in a community which is extremely solicitous that such action be taken.

"By May 6th, however, the situation changed. The Journal of Sicily published an official declaration from the Italian Minister of Agriculture, Industry and Commerce, as follows:

"'Chamber of Commerce, Palermo: I inform the Chamber of Commerce for the useful information of merchants, that by the decree of April 23d of the Spanish Government, are considered as contraband of war, arms, projectiles, fuses, powder, sulphur, nitre. * * * I would also state that in consequence of our request, the Spanish Government has given notice to the commanders of its vessels to let sulphur pass free. (Signed). The Minister Coeco-Ortu.'

"Here was an official declaration which the master should have accepted as sufficient. The Italian Government, through a Cabinet Minister, announces that official action has been taken by the Spanish Government, the practical result of which was to make sulphur free from capture. It matters not that the Spanish Government might thereafter reconsider this decision and direct its cruisers to seize sulphur, because it was to be assumed that cargoes taken out in reliance upon the proclamation of the Italian Government would be respected. If they were not the Italian Government would have good ground for claiming indemnity from Spain, and a *casus belli* in case of its refusal."

On the question of the measure of damages the Court of Appeals say:

"The measure of damages in such cases is well settled. The loss is the difference between the price the goods actually brought and the price they would have brought had they been sold on the day when they should have arrived" (p. 349).

The ruling of the District Judge that the invoice value should be taken as the basis of damages from

which there should be deducted the amounts realized when the goods were brought forward in the *Abbazia* under the stipulation of August 12th (p. 197) was disapproved.

It happened that by reason of the outbreak of war there was a great demand for sulphur in June, 1898, in consequence of which the price is said to have advanced from $18.50 a ton to $30 and $35 a ton, while the price in October, when the goods were finally brought forward for sale under the terms of the stipulation of August 12th, had again fallen to the normal figure of about $18.50 a ton. The decision of the Court of Appeals, if sustained, would award damages to the libelants for the amount of such profits in excess of the invoice value to the extent of about $25,000.

The claimant applied for a rehearing in the Court of Appeals, on the ground that the decision as to the measure of damages was contrary to the terms and spirit of the stipulation of August 12th, under which the goods were brought forward for sale on the terms and conditions therein stated (*Petition*, pp. 352–359).

In view of the reservations of the stipulation it was pointed out that the intention was that the cases should be dealt with, and the damages for non-delivery, if liability was established, should be measured precisely as though the stipulation had not been made, and the cargo had not subsequently been brought forward; and that only after this had been done should the stipulation be looked at to ascertain the amount of the credit to be set against such damages.

The application for a rehearing was granted (p. 360) and a reargument was had. The opinion, filed after the reargument (pp. 363–364) reaffirmed the previous decision, holding in effect that if the cargo had not been brought forward the ship's liability would not have been limited to the invoice value of the goods by the clause contained in the bill of lading (p. 363). It further decided that the parties did not intend, by

the stipulation, that which had been explicitly provided in it, namely, that the proceeds of the sale should be credited against the judgments recovered by the libelants (p. 364).

The claimant in the four main cases made application to this Honorable Court for writs of *certiorari* to review these findings, and the application having been granted the claimants in the four cross-libels made similar applications, which were also granted.

POINTS.

I.

There was no contract to carry contraband cargo. The outbreak of war rendered sulphur contraband and unlawful cargo, and relieved the shipowner of all obligation to forward it.

a. In every contract of shipment it is implied that the cargo is lawful merchandise, not contraband (*Boyd* v. *Moses*, 7 Wall., 316, 319-320).

The shipowner's undertaking in these cases to carry the sulphur, was based on the supposed fact that it was lawful cargo. In point of fact the sulphur had become unlawful cargo under the laws of war, by reason of the outbreak of hostilities between Spain and the United States (3 *Kent's Com.*, *267).

Not only was sulphur of the class of cargo known as "absolutely contraband" under the law of nations (2 *Halleck's International Law* [Baker's Ed.], 224, 225; *Holland's Naval Prize Law*, 19; *The Panama*, 176 U. S., 535, 545), but it had been specifically designated as contraband in the Spanish proclamation of war, in which orders had been given to the Spanish authorities to search vessels for it and confiscate it wherever found (*ante* p. 7).

The minds of the parties, therefore, never met on the proposition to transport a contraband cargo; the relanding of the cargo at the port of loading to the order of the shippers was not a breach of contract, and was not an act that entailed any liability for damages therefor on the ship.

The District Court does not seem to have passed on this question specifically, but it is the subject of a distinct finding by the Court of Appeals as follows (p. 344):

"The master, where the contract was made in times of peace, could properly decline to carry forward a cargo which by the subsequent breaking out of war had become contraband."

* * * "The ship made no contract to carry contraband of war to the port of a belligerent, and should not be held to the obligations of a contract into which she had never entered."

The *Styria*, as a common carrier, could have refused to accept the sulphur if her master had known that a state of war existed when the sulphur was tendered for shipment (*Boyd* v. *Moses*, 7 Wall., 316, 319–320; *Weston* v. *Minot*, 3 Woodb. & M., 426; 29 Fed. Cas., 807, 810; *Carver Car. by Sea*, 3d Ed., § 244).

The fact, therefore, that the master received the sulphur in the mistaken belief that it was lawful cargo, or that events occurring between the receipt of the cargo and the ship's readiness to sail, changed the lawful character of the cargo, and made it unlawful, cannot make him subject to the obligations which would have been imposed on him by the contract, or as a common carrier, if the cargo had in fact been lawful.

There can be no doubt that the master would not have been justified, from any point of view, in starting on a voyage with contraband cargo to the port of a belligerent.

b. According to the ancient law and the usage among nations, if a ship was captured with contra-

band on board, the vessel was condemned as well as the cargo.

On this, *Bynkershoek Quaestionum Juris Publici (1737), Liber I Cap. X, p. 77:*

"Ceteroquin regula est, pactis fere perpetuis probata, ne non hostes ad hostes nostros vehant *contrabande goederen*, si vehant & deprehendantur, in commissum cadant, exceptis autem his libere utrimque mercantur, & quaecunque alia ad hostes vehunt impune."*

The learned *Heiniccius* considers this question in his *Operum ad Universum Juris Prudentiam De Navibus Ob Vecturam Vetitarum Merciurn Commissis* (1746), *Cap. II., Sec, III., p. 342:*

"Quamvis autem tantus sit nautarum naviumque favor, ut nihil reliqui fecerint legislatores, ut illos, quantum salva republica fieri posset, in tuto collocarent; saepenumero tamen contingit, ut captae pro commisso teneantur. Non modo enim ab hostibus & praedonibus maritimis capiuntur, qui sibi in hostium naves omnia licere existimant, verum etiam ab amicis si merces vetitae vel ad hostes vel ad cives ipsos advehuntur. Hoc enim casu non solum merces ipsae, verum etiam navis cum universo adparatu nautico comissae iudicantur. * * * Ast si certae merces illicitae declarantur, lex commissi est, ne merces eo vehantur, adeoque ea lex & merces ipsas, & navem, qua vehuntur, complectitur. Aequum id Romanis iam visum est. Ait enim *Paullus* Iureconsultus: 'Dominus navis, si *Illicite* aliquid in nave, vel ipse, vel vectores imposuerint, *Navis* quoque fisco vindicatur.' Et hoc iure hodienum utuntur gentes, quoties cum aliis bellum gerunt.

* "In other respects it is the rule attested by an almost unbroken line of treaties, that neutrals shall not carry to our enemies contraband goods; if they do carry and are caught, they incur confiscation, those things, however, being excepted which they traffic in freely on both sides, and everything else that they carry to the enemy without penalty."

Tunc enim omnes naves, mercibus illicitis onustae, una cum mercibus a fisco occupantur."*

SEC. VI.:

" Quamvis vero hoc jus merces illicitas una cum navibus capiendi & antiquum satis & hodienum inter gentes frequentissimum fit: in promtu tamen sunt exempla, quod inter gentes aliud convenit."†

Heiniccius then enumerates certain treaties which expressly exclude from condemnation the

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* " But, however great the good-will toward sailors and ships may be, as the law-givers, indeed, have left nothing undone that they be held harmless, so far, indeed, as it can be done with safety to the State, yet it happens frequently that the captured vessels are held for confiscation; for they are seized not only by the enemy and by privateers who think that all things are permitted to them with respect to the enemies' ships, but also by neutrals if unlawful merchandise is carried to the enemies or to the citizens themselves.

For in this event not only the merchandise itself, but also the vessel with all its tackle are adjudged confiscated. * * *

But if indeed certain merchandise is pronounced unlawful, the law of confiscation is that the merchandise shall not be taken thither; and, indeed, the law is that both the merchandise and the ship in which it is carried are confiscated. That indeed seemed a just thing to the Romans, for Paullus, skilled in the law, says: ' If the master of the ship or the sailors have placed anything on the vessel unlawfully, the vessel also is condemned.' And this law is followed to-day by nations whenever they carry on war with others, for now all vessels laden with unlawful merchandise are confiscated along with the merchandise."

† " But although this law of confiscating unlawful merchandise, together with the vessels, was very general among nations not only in olden times, but at the present day; nevertheless, there are examples where different agreements were made between nations."

ships themselves that carried contraband goods. He continues:

"Sed quemadmodum ejusmodi pacta ad exceptionem pertinent: ita facile patet, regulam istis non tolli, adeoque certi juris esse, ob merces illicitas naves etiam in commissum cadere."*

c. In later times the rigor of this procedure has been lessened. *Pratt on Contraband of War*, LXVIII., LXIX., refers to this topic as follows:

"It now only remains to consider the consequence of carrying contraband.

The first is, of course, the confiscation of the article itself, of which every case of condemnation affords an example.

By the ancient law of Europe the confiscation was also extended to the vessel, the medium of conveyance and instrument of offense (The *Ringende Jacob*, 1 C. Rob., 90; The *Mercurius*, 1 C. Rob., 288).

But in the modern practice of the Court of Admiralty a relaxation has been introduced and a milder rule has been adopted. Independent of the forfeiture of the article of contraband, the conveyance of it is, in general, only attended with loss of freight and condemnation in expenses of bringing it in together with the costs of suit (The *Sarah Christina*, 1 C. Rob., 242; The *Mercurius*, 1 C. Rob., 288, *Note;* The *Neutralitie*, 3 C. Rob., 297). * * *

This relaxation, however, is only extended to the property of such parties as may fairly be supposed to be free from all participation in the offence, the known ground on which it was introduced being the supposition that freights of noxious or doubtful articles might be taken without the knowledge of the owner (The *Elizabeth Catherina*, *Pratt on Contraband of War*, p. 115); where, therefore, in the case of the *De Vrow Anna Maria* (*Pratt on Contraband of War*, pp. 119, 122), the contraband goods were put on board the ship by the consent and privity of the owners, it also was included in the same sentence of condemnation."

See also The *Panama*, 176 U. S., 535.

* "But whatever exceptions these treaties show, yet it is very clear that the rule is not changed by them, but that it is undoubted law that ships incur condemation by reason of unlawful merchandise."

Though the vessel herself may not be condemned if captured, yet the transportation of contraband goods to a belligerent destination is not a lawful trade for a neutral vessel.

In the *Peterhoff, 5 Wallace, 28,* Chief Justice Chase said:

"We know of but two exceptions to the rule of free trade by neutrals with belligerents; the first is that there must be no violation of blockade or siege; and the second that there must be no conveyance of contraband to either belligerent" (p. 56).

"*The conveyance by neutrals to belligerents of contraband articles is always unlawful,* and such articles may always be seized during transit at sea" (p. 58).

The same doctrine has been previously laid down in the *Bermuda,* 3 Wall., 514, 551: "So, too, *except goods contraband of war,* or conveyed with intent to violate a blockade, neutrals may transport to belligerents whatever belligerents may agree to take.

Davis, International Law (p. 339), says:

"International law declares the act of transporting contraband, and breach of blockade, to be unlawful, and denounces the penalty of confiscation upon the goods, and in some cases upon the ships engaged in such illicit trade."

The same author further states (p. 353):

"The conveyance of contraband of war is an offense against the law of nations."

Owen, Declaration of War (p. 187), announces a similar principle:

"Neutrals possess, as we have seen, the right to ship warlike stores as between themselves, but they must not carry such articles to belligerents" (p. 183).

"A neutral vessel carrying contraband of war must on no account touch at an enemy's port" (*The Trende Sostre,* 6 C. Rob., 387).

The District Judge said on this point:

"The sulphur being generally regarded as contraband of war, and also within the express terms of the Spanish proclamation, a voyage through the Mediterranean, past the coast of Spain and through the Straits of Gibraltar would presumably be pecuniarily dangerous to the cargo, even though the vessel, as a neutral, might not be liable to condemnation as prize. In case of seizure, however, the shipowner would suffer from the considerable delay incident to the seizure though she were ultimately released" (fol. 943).

The Court of Appeals said as to this (p. 340):

"While the state of war continued unmodified, under the rules of international law, sulphur or brimstone shipped and owned as this was, was subject to seizure by war vessels of Spain on the high seas, a process which would involve the arrest of the neutral vessel carrying it wherever she might be, off the coast of Sicily, in the Straits of Gibraltar, or on the banks of Newfoundland, her enforced deviation from her voyage to a Spanish port and her detention there until a Spanish prize court should have determined the questions arising upon confiscation of the cargo."

d. If, therefore, there was no contract between the parties as to the carriage of contraband cargo, and obviously there was not, for the cargo was not known to be contraband when it was shipped, then the master was under no duty, as a common carrier or by contract, to carry the sulphur. He was in the position that he had on his ship the goods of a third party that he could not carry.

He was bound to take reasonable care of all the goods that had been entrusted to him, and he would have failed to discharge his duty in this respect if he had omitted to reland the sulphur (*Carver, Carriage by Sea*, 3d Ed., § 294). In *Nobel's Explosives* v. *Jenkins* [1896], 2 Queen's Bench, 326, where a master had followed a course similar to that adopted

by the master of the *Styria*, Mathew, *J.*, (p. 332) said:

" But, apart from the terms of the bill of lading, it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods entrusted to him " (See also *Holladay* v. *Kennard*, 12 Wall., 254, at p. 257).

He could do nothing more than put the contraband goods ashore under safe custody. It has never been claimed that the master discharged the sulphur in an improper manner as to the actual discharge, or that the warehouses in which it was stored were not proper and safe places for its reception.

The act of relanding and storing the sulphur was not a wrongful act. It was, indeed, the only thing he well could do. The Court of Appeals said (p. 344):

" Inasmuch as the master, where the contract was made in times of peace, could properly decline to carry forward a cargo which by the subsequent breaking out of war had become contraband, we fail to see why he should not have the right to land such contraband cargo, with all proper precautions as to safe-keeping, thus leaving his ship free to discharge its obligations to innocent cargo without risk of delay by reason of an actual arrest which would be caused only by the presence of such contraband cargo."

The act of the master in relanding the sulphur " for facts of war " and " for your (their) own account and risk " as stated in his notice to the shippers of the cargo (fol. 427), together with his further notice to the shippers, after the sulphur had been unloaded, that the sulphur was in warehouse and could be obtained on payment of the expenses incurred (fol. 443), showed that the master regarded the contract for the carriage of the sulphur as at an end. The sulphur was then at the disposal of the

shippers or its owners, subject to the payment of the expense incurred with respect to it. It was not necessary for the master to state specifically that the contract was abrogated because of the war and the change in the character of the sulphur from lawful to unlawful cargo, though he did so in effect. It was sufficient that by his acts no doubt was left in the minds of the shippers and of the consignees of the sulphur that it would remain where it was in Sicily, so far as the master was concerned. If the owners wished to have the sulphur carried forward it would necessarily be under some other contract than that the parties thought they had made here.

If there was no contract between the parties at the time the sulphur was relanded, it follows conclusively that the libels should have been dismissed. There was no subsequent act by the parties that formed a contract between them. Their relations to each other were as if no contract had ever been. The contract the parties had made was for the carriage of lawful cargo, and there was nothing on which the contract could act.

It was suggested on the argument in the court below that the sulphur was loaded and the bills of lading were given at a time when whatever danger existed on account of the war was known to the master. The answer of the Court to this was (p. 339):

"There is no evidence in the case which will warrant a finding that the captain knew that war had been declared before he shipped libelant's sulphur and signed bills of lading therefor."

This finding it is submitted should be conclusive on the fact. The evidence, indeed, shows that it was impossible that the captain could have had any such knowledge. The bill of lading of the sulphur for Parsons was signed on April 21st (fol. 401); Malcolmson's bills of lading were signed on April 22d and 24th, respectively (fol. 403); that of Morgan was

signed on April 23d (fol. 399), and that of Munroe on April 24th (fol. 400).

All the sulphur had been loaded on board by April 24th (*ante*, p 6).

The first overt act of war took place on April 22d, on the capture of the Spanish merchant steamship "*Buena Ventura*," by the United States war vessel (The *Buena Ventura*, 175 U. S., 384). Whether or not this fact was known to the master, and there is no evidence in the record that it was, it could not have been sufficient notice to him that war existed so that the sulphur became contraband cargo. It might well have been that the capture of this vessel would be disavowed by the United States, and such amends made as would close the incident. The capture of the steamship did not necessarily mean war.

No acts of hostility had been committed by Spain prior to April 25th, and the international status was so uncertain that on that day the President, in a message to Congress, after stating that diplomatic relations between the two governments had been broken off, and that he had ordered a blockade of certain ports in Cuba, added:

"In view of the measures so taken, and with a view to the adoption of such other measures as may be necessary to enable me to carry out the expressed will of the Congress of the United States in the premises, I now recommend to your Honorable body the adoption of a joint resolution declaring that a state of war exists between the United States of America and the Kingdom of Spain, and I urge speedy action thereon, to the end that the definition of the international status of the United States as a belligerent power may be made known and the assertion of all its rights and the maintenance of all its duties in the conduct of a public war may be assured" (*Messages and Papers of the Presidents*, Vol. 10, p. 154).

No declaration of war was made on either side until April 25th. On that date the Queen Regent of Spain issued her proclamation declaring war, and the Congress passed and the President approved the

act declaring that war existed between the United States and Spain, and that it had existed since April 21st (*ante*, *p.* 8). The fact, however, that Congress regarded the war as having existed several days prior to the official declaration of war cannot charge the master with knowledge of such fact.

It may well be that it was a matter of common knowledge, when the sulphur was being loaded, that relations between the United States and Spain were strained, but the captain was in no position to foretell the course of events, and so refuse to accept the sulphur on the ground that it would shortly become contraband and unlawful cargo.

If, however, when the sulphur did become unlawful cargo, the master was justified in putting it ashore and landing it then it would follow that all expenses incurred in consequence with respect to the sulphur should fall on the sulphur itself and not on the ship. Under the decision of the District Court the ship had to bear those charges of relanding and of storage. The Court of Appeals held that the sulphur should pay all the expenses up to the 6th of May and the ship should pay those after that date(p. 348).

e. The rule that the contract of carriage is dissolved, where by reason of the outbreak of war the cargo has become contraband and subject to capture, is approved and followed under many of the maritime codes.

In the German Code (Art. 629) it is provided: "Either party can withdraw from the contract without being liable for damages * * * when, before the commencement of the voyage, a war has been declared, in consequence of which the vessel, or the goods to be shipped according to the contract of affreightment, or both, can no longer be considered free, and would be liable to risk of capture" (*Raikes, Mar. Code of Ger. Empire*, London, 1900, p. 38).

The Code of Holland (Art. 500) provides: "Either party may rescind a contract of affreightment, if, before the voyage commences, a

war breaks out in consequence of which the ship and cargo, or either of them, cannot be considered as neutral property. * * * If the cargo alone ceases to be neutral, the shipper pays the shipowner all the disbursements he has necessarily made in preparing for the voyage, and the wages and victualling of the crew up to the date at which the contract was rescinded, or cargo which had been loaded was discharged" (*Raikes, Mar. Codes of Holland & Belgium*, London, 1898, p. 42).

Other codes provide in general terms that if the sailing of the ship for the port of distribution is stopped by *force majeur*, war, blockade, or prohibition of trade by an act of Government, the contract of affreightment is rescinded (*Italy*, Art. 551, *Raikes, Code of Italy* p. 30; *Belgium, Art.* 90; *Raikes, Codes of Holland and Belgium*, p. 149; *Spain, Art.* 690; *Portugal, Art.* 547; *Raikes, Codes of Spain and Portugal*, pp. 47, 154; *France, Art.* 276; 2 *Valroger*, p. 231).

Valroger remarks (§ 710) that in consequence of the declaration of war between France and Germany, the French Courts held that contracts of affreightment for Baltic and North Sea ports were rescinded, though the ports of destination were not in dependencies of Germany; the reasons being, apparently, that the vessels in proceeding to their ports of discharge would be virtually within the power of the Germans and easily subject to capture.

Valroger further states (§ 711) that it is difficult, in his view, to deny the right of rescission, though there be no general interdiction of commerce, if the freighting arrangement relates to a specific kind of goods, and the carriage of such goods is prohibited by *force majeur*. *

* In the *Consulat de la Mer* the following provision is found:

"Cependant un patron peut s'excuser de faire le voyage pour quatre cause, savoir: pour maladie, pour se marier, pour aller en pélerinage, s'il en avait fait le voeu avant de fréter son naivre, et par empêchement de l'autorité publique" (2 *Pardessus, Us et Coutumes de la Mer*, p. 165).

Desjardins, Vol. III., pp. 505, 506, comments on the French law to the same effect as Valroger. He says:

"There is, it may be supposed, a French vessel destined for a Russian port in the Baltic; France is at war with Denmark and with Germany. It is certain, if the contract is carried out, that the ship will be captured by one power or the other. Could the freighter, under those conditions, constrain the owner to give the vessel into this service or recover damages for his refusal? In the first place, it would be iniquitous. Then, again, Art. 276, though it provides specially for the case of an interdiction of commerce, does not exclude other cases of *force majeur* which indefinitely postpone performance of the contract. * * * The Judge has a wider latitude. He decides not only according to the text of Art. 276, which deals with another question, but also on general principles of law; if he determines, as a fact, that the execution of the contract has been indefinitely postponed he must decide that the owner is discharged from his obligation."

The Court of Appeals has decided that the outbreak of war, and the declaration that sulphur was contraband, fairly presented to the mind of the master a case in which he should have assumed that the obstacle to the performance of his agreement to transport the sulphur would probably continue for an indefinite time; and that, accordingly, he did right to unload the sulphur when he did (pp. 344–345). That being so, the Court should have found, further, that the agreement to carry it was discharged, and could not again be revived by the advent of new conditions, which at a later time made it possible to reload or transship the goods.

II.

If it should be considered that a contract existed under the bills of lading to carry the sulphur after it became contraband of war then the master was justified by the provisions of the bills of lading in relanding the sulphur and storing it at Port Empedocle.

It has been contended in the previous point that the outbreak of war, as a result of which the sulphur became contraband and unlawful cargo, rendered the agreement to carry sulphur, as evidenced by the bills of lading, null and of no effect whatever by removing from the purview of it the subject matter on which only it could act. If, however, it should be considered that the facts of war did not altogether abrogate the agreement, yet it is contended that by the very terms of the bills of lading the master was justified in relanding the contraband cargo and storing it at Port Empedocle for the shipper's account.

The answers in these cases set up four separate defenses as justification for the acts of the master in relanding the sulphur and storing it at Port Empedocle and failing to deliver it at New York on the arrival of the *Styria* in June, 1898. The defenses in all the cases are the same, and will be considered in order.

a. The conduct of the master was justified under the clause in the bill of lading, "Restraints of Princes and Rulers of People * * * excepted."

The last of the sulphur had been loaded in the *Styria* on April 24 (fols. 489-490). The bills of lading had all been delivered prior to or on that day (fols. 399-404), and the vessel was then ready to sail.

As the Court of Appeals said (p. 339), "There is no evidence in the case which will warrant a finding that the captain knew that war had been declared

before he shipped libelant's sulphur and signed bills of lading therefor." On April 25, however, the Queen Regent of Spain had issued her proclamation declaring that war existed between Spain and the United States; that sulphur was contraband and was subject to *confiscation* by Spain *under whatever flag* it should be carried, and that the Ministers of State and Marine were charged to see the fulfillment of the royal decree and to give the orders necessary for its execution (fols. 871, 814). It was on the same day that the Congress at Washington had passed and the President had approved the declaration of war with Spain (*ante*, p 8).

On April 22 a Spanish merchant steamship had been captured by the United States warships (*The Buena Ventura*, 175 U. S., 384), and at that time diplomatic relations between the two countries had reached the breaking point.

When it became known that a state of war actually existed between Spain and the United States, the managing owners on or before April 26th telegraphed to the master to discharge the sulphur (fols. 412, 495, 515).

The master well knew that sulphur was used in making gunpowder (fol. 453), and he thought, of course, that it was contraband (fols. 470 and 471), quite irrespective of any proclamation by the Queen Regent of Spain, and he knew, also, when he relanded the sulphur that war existed between the United States and Spain (fol. 461). Indeed, as the Court of Appeals say (p. 345): "We should have some doubts as to the efficiency of a master for international commerce who did not know that sulphur was contraband of war. It certainly should be a safe assumption for the master of a neutral vessel to make that he cannot carry such cargo to the ports of one belligerent without risking its seizure by the other."

The master testified that he had heard that a blockade of New York was going on (fol. 462), and that it was reported in Sicily that Spanish men

of war were looking for ships along the coast of Spain (fol. 493). He believed this report (fol. 494). He also testified that the newspapers in Sicily reported that a ship laden with sulphur had been captured by a Spanish man of war (fols. 501, 523).

Spain had given notice to the world that her power would be exercised to search all vessels on the high seas for and to seize all sulphur so found The course of the *Styria* to New York would take her close along the Spanish coast through the narrow straits of Gibraltar, having Spanish territory on both sides, and near the Spanish naval base at Cadiz (fol. 413).

Were these facts and the circumstances in which the master was situated sufficient to cause such a reasonable apprehension of capture in "the mind of a master of ordinary courage, judgment and experience" (Sir R. Phillimore in the *San Roman*, L. R., 3 Adm. & Ecc., 593) as to constitute a "Restraint of Princes and Rulers of People?"

Carver, Carriage by Sea (3d ed.), § 82, p. 96, dealing with the exception, says:

"'Restraints of princes, rulers and peoples' covers any forcible interference with the voyage or adventure at the hands of the constituted government, or ruling power of any country (*Nesbitt* v. *Lushington*, 4 T. R., 783; *Aubert* v. *Gray*, 32 L. J., Q. B., 50), whether done by it as an enemy of the State to which the ship belongs, or not. For example, *orders of government* prohibiting or restricting the exportation or landing of goods; quarantine regulations, embargoes or restrictions on particular ships; blockades; confiscations of goods as *contraband*, and so forth. And the restraint may have been by acts which were not directed against the ship or goods; they may have been affected indirectly (*Rodoconachi* v. *Elliott*, L. R., 9 C. P., 518). * * *

"Where a blockade by the French actually existed at Hamburg, the place to which the cargo was to be carried, this exception excused the shipowner's refusal to take it on board (*Geipel* v. *Smith*, L. R., 7 Q. B., 404).

"The exception does not protect the owner when the master has acted unskillfully or imprudently or with an unreasonable degree of apprehension. But it is not limited to restraints actually exerted by force. *The master is entitled and bound to use caution in avoiding the risk of actual seizure;* and deviations and delays on the voyage prudently made with that object are excused by the clause (*The San Roman*, L. R., 5 P. C., 301; *The Teutonia*, L. R., 4 P. C., 171)."

In *Abbott on Shipping* (13th ed., pp. 503, 504), the rule with regard to this clause is stated as follows:

Mr. Justice Byles, in *Russell* v. *Niemann*, 34 L. J., C. P., 10, 14, thus summed up the above and kindred exceptions: "The 'King's enemies' means the enemies of the carrier's sovereign, whatever title he may enjoy, whether queen, emperor, president, duke, doge or aristocratic assembly; and lest there should be anything left out, 'restraint of princes' I should conceive, comprehends every case of interruption by lawful authority. * * * So that those three exceptions, the king's enemies, restraint of princes and perils of the sea, seen to include every species of *vis major;* and by the technical rules of our law, it is necessary to guard against incidents of this nature by express words. * * *

To *constitute restraint within the meaning of this exception, it is not essential that there should be physical seizure, or arrest of ship, or goods.* Thus in *Rodoconachi* v. *Elliott*, L. R., 9 C. P., 518 (1874), it was held that silk insured from Shanghai to London *via* Marseilles, which was detained in Paris during the siege by the German army, was lost, within the meaning of the policy, by restraint of kings and princes, because "the goods were as effectually prevented from coming out" (of Paris) "as if they had been actually seized by the German army" (at p. 522). And in *Geipel* v. *Smith*, L. R., 7 Q. B., 404 (1872), it was held that the defendant, who had contracted to load a cargo of coal for the plaintiff, and carry it to Hamburg, was excused even sending his ship to load the cargo, as since the making of the charter-party war had broken out between France and Germany, and Hamburg had been blockaded by the French fleet.

Scrutton on Charter Parties and Bills of Lading (4th ed.), p. 177, says:

"This exception applies to forcible interferences by a State or the government of a country taking possession of the goods by a strong hand, such as arrest, embargoes (*Rotch* v. *Edie* [1795], 6 T. R., 413), or blockades (*Geipel* v. *Smith* (1872), L. R., 7 Q. B., 404); *to government action for other purposes, indirectly resulting in the detention of the goods* (*Rodoconachi* v. *Elliott* [1874], L. R., 9 C. P., 518); to the decrees of a Prize Court after capture (*Stringer* v. *English & Scottish Mar. Ins. Co.* [1870], L. R., 5 Q. B., 599); or to embargoes imposed by the government of the shipowner (*Aubert* v. *Gray* [1861], 3 B. & S., 163); *or to the risk of such proceedings* (*Nobel's Explosives* v. *Jenkins* [1896], 2 Q. B., 326)."

The statements from the books show that an actual physical taking of the goods is not necessary to constitute a restraint of princes. The adjudicated cases fully support this proposition.

In *Rodoconachi* v. *Elliott* (1874), L. R., 9 C. P., 518, goods in transit from China to England had reached Paris at the beginning of the siege of the city by the German army. The usual, but not the only route of forwarding goods from Paris to England was by way of Boulogne. All communication between Paris and Boulogne had been cut off. While the goods remained at Paris the German army took possession of all the roads leading out of Paris and completely besieged the city. It was held by the Exchequer Chamber that the goods were prevented from leaving Paris, and that there was a constructive total loss within the terms of a policy which insured against restraints of kings and princes.

BRAMWELL, *B.*, said at page 522:

"But it is said that there has been no loss of the goods by restraint of kings and princes in this case, because there has been no specific action on the goods themselves. It is true that there was no actual seizure or arrest of the goods, nor was

there any specific or published order prohibiting the transport of goods from the beseiged city; but the city in which the goods were was beseiged and completely invested, all commerce was stopped, and the goods were as effectually prevented from coming out as if they were actually seized by the German army."

In *Geipel & Smith* (1872), L. R., 7 Q. B., 404, the defendants had agreed to load a cargo of coal in England and sail to Hamburg. After the charter-party had been made, war broke out between France and Germany and the port of Hamburg was blockaded by the French fleet. The defendants refused to carry out the charter-party relying, on an exception of restraints of princes and rulers. It was held that they were justified in their refusal.

COCKBURN, *C. J.*, said (p. 410):

"Is a blockade a restraint of princes? I think it is * * * provided the restraint is effective; and in the eye of the law a blockade is effective if the enemy's ships are in such numbers and position as to render the running of a blockade a matter of danger, although some vessels may succeed in getting through. In such a case the obstacle arises from an act of state of one of the belligerent sovereigns, and consequently constitutes a restraint of princes."

As to the contention that the defendants were bound to be in readiness to carry the cargo as soon as the blockade should be raised, COCKBURN, *C. J.*, said at (p. 410):

"But it would be monstrous to say that in such case the parties must wait, for the obligation must be mutual—till the restraint be taken off—the shipper with cargo which might be perishable or its market value destroyed—the shipowner with his ship lying idle, possibly rotting."

LUSH, *J.*, said (p. 414): "A state of war must be presumed to be likely to continue so long and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like this."

The case of *Nobel's Explosives Co.* v. *Jenkins* (1896), 2 Q. B., 326, although distinguished by the District Court by the brief statement that "the facts were otherwise," is, in fact, as we submit, very much in point. In that case the plaintiff's goods, which were dynamite and contraband of war, had been placed upon a general ship of the defendants for carriage from London to Yokohama under a bill of lading containing clauses almost identical in form with the above clauses (*a*) and (*b*) of the *Styria's* bills of lading. The ship, as in this case, also carried non-contraband goods belonging to other shippers. In the course of the voyage she arrived at Hong Kong, and while there war was declared between China and Japan. There were at the time Chinese war vessels in and around the port of Hong Kong, and it was found that if the master had attempted to sail thence with the plaintiff's goods on board there would have been danger of their being seized and confiscated. The master cabled to his owners for advice, and they instructed him to land the cargo at Hong Kong; this was done. The plaintiffs forwarded the dynamite by another steamer several months later. They then brought an action to recover from the defendants the amount of freight which they had to pay for so forwarding, and also for the other expenses for relanding and reshipping the cargo at Hong Kong.

It was held: (1) that the delivery of the goods at Yokohama was prevented by restraint of princes and rulers within the exception; (2) that such risk of seizure on the voyage between Hong Kong and Yokohama rendered the "entering of or discharging in the port" of Yokohama unsafe within the meaning of the special clause; and (3) that the master's duty to take care of the cargo justified him, apart from any exception in the bill of lading, in landing the plaintiff's goods where he did.

Mathew, *J.*, in the course of his judgment, discussed the matters now before the Court, as follows:

"The main ground of defense was the exception in the bill of lading of 'restraint of princes, rulers or people.' A large body of evidence was laid before me to show that if the vessel sailed with the goods on board she would, in all probability, be stopped and searched. It was certain in that case that the goods would have been confiscated, and quite uncertain what course the captors would take with the ship and the rest of the cargo. I am satisfied that if the master had continued the voyage with the goods on board he would have been acting recklessly. It was argued for the plaintiffs that the clause did not apply unless there was a direct and specific action upon the goods by sovereign authority. It was said that the fear of seizure, however well founded, was not a restraint, and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel* v. *Smith*, L. R., 7 Q. B., 404, and *Rodocanachi* v. *Elliott*, L. R., 9 C. P., 518. The goods were as effectually stopped at Hong Kong as if there had been an express order from the Chinese Government that contraband of war should be landed. The analogy of a restraint by a blockade or embargo seems to me sufficiently close. The warships of the Chinese Government were in such a position as to render the sailing of the steamer with contraband of war on board a matter of great danger, though she might have got away safely. The restraint was not temporary, as was contended by the plaintiffs' counsel. There was no reason to expect that the obstacle in the way of the vessel could be removed in any reasonable time. I find that the captain in refusing to carry the goods farther acted reasonably and prudently, and that the delivery of the goods at Yokohama was prevented by restraint of princes and rulers within the meaning of the exception.

"But, apart from the terms of the bill of lading, it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. Whether he has discharged that duty must depend upon the circumstances of each case, and here, if the goods had been carried forward, there was every reason to believe that the ship would be detained and the goods of the plaintiffs confiscated.

In the words of Willes, *J.*, in *Notare* v. *Henderson*, L. R., 7 Q. B., 225, at p. 237, 'a fair allowance ought to be made for the difficulty in which the master may be involved * * * The place, the season—the opportunity and means at hand, the interests of other persons concerned in the adventure and whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay and inconvenience must be taken into account. I am of opinion that the course taken by the captain in landing the goods and landing them in safe custody was a proper discharge of his duty. It was said that the master was not an agent for the shippers, because they had protested against the discharge of the goods. But even if this information had reached the captain, it would not have divested him of his original authority and discretion as agent in any emergency for the owners of the ship and the other owners of the cargo" (p. 330).

If the master was justified in believing that there was reasonable probability that the *Styria* would be stopped and searched by the war vessels of Spain if she attempted to carry the sulphur to New York, then, as in *Noble's Explosives* v. *Jenkins* (*supra*) there was a restraint of princes and rulers and the ship was justified in refusing to carry the sulphur.

Sir Robert Phillimore stated the rule in the *San Roman*, L. R., 3 Adm. & Ecc., 593, as follows:

"According to both (the laws of England and Germany) an apprehension of capture, founded upon circumstances calculated to affect the mind of a master of ordinary courage, judgment and experience, would justify delay."

There can be no doubt that there was such a real risk; as the Court of Appeals said (p. 341):

"It seems manifest that, upon the outbreak of war, a voyage with contraband on board to the port of one of the belligerents might fairly be regarded as a risky piece of business. The suggestion made upon the argument that the naval power of Spain was not such as would induce a 'man of ordinary courage, judgment and experience' to hesitate to

proceed is of no weight. We may not attribute to the captain of the *Styria* knowledge gained after the event; and, indeed, this Court is not advised of any historical facts which would warrant the conclusion that it was not entirely within the power of Spain during the first few months of the war to arrest and search every vessel westward bound through the Straits of Gibraltar, and picking her way along by the lighthouses on the Spanish coast."

It can make no difference whether the zone of danger, through which the vessel would have to pass to deliver the cargo, was wide or narrow. This danger may exist at any part of the voyage, and if it is unavoidable it is equally a restraint of princes and rulers, whether it exist at the port of loading or at the contemplated port of discharge. To quote the language of the Court of Appeals (at p. 342):

"There is no logical difference between a restraint of princes and rulers exercised by a cruiser with power to visit, search and seize lying two leagues off Cape Empedocle, and that exercised by a half-dozen cruisers patrolling a narrow strait through which, if the voyage be made, the vessel must pass. Under such circumstances the owner of contraband cargo (loaded as this was before war broke out) could with reason insist that it would be gross negligence on the part of the ship to bring his cargo forward. Moreover, it would certainly be unreasonable to require the ship to remain in port with the contraband cargo on board until the war should cease, a period of months, possibly years. The owners of other cargo not contraband have rights as much, if not more entitled to consideration than those of the owners who have been unfortunate enough to ship the cargo which has produced the risk."

If the carrier has reasonable grounds for believing that his voyage will be attended with danger to the cargo, whether by reason of restraint of princes or otherwise, it is clearly his duty to exercise due care to avoid loss. For breach of this duty he will be held liable.

The leading case on this subject in this country is that of *Holladay* v. *Kennard* (1871), 12 Wall., 254.

In that case the defendant's servant, an express messenger, in charge of a stage on a line passing through Colorado Territory, in January, 1865, was warned of the presence of a hostile force in the neighborhood, and advised to remain at a military post. Disregarding this information, he left the military post, and subsequently the stage was captured by the Indians, who rifled the express company's safe which contained the plaintiff's property. The Court charged the jury that the attack of the Indians was that of the public enemy. The question left to the jury was whether or not the messenger used due care to avoid a loss by the enemies. The jury found for the plaintiff, and the judgment was affirmed.

Mr. Justice Bradley, in delivering the opinion of the Court (at p. 257), said:

"The effect of the charge as delivered was that although a common carrier is not responsible for the destruction or loss of goods by the act of a public enemy, he is nevertheless bound to use due diligence to prevent such destruction or loss. If his negligence or want of proper attention contributed thereto he would be liable therefor. It was not necessary in this case that there should have been fraud or collusion with the Indians or willful negligence on the part of the defendant or his agents to render him liable. Supposing the express agent to have been a suitable person for the duty he had to perform, all that the charge *exacted* of him was such care and attention as he naturally would have taken of his own goods, that is, ordinary care and attention.

Surely the law requires this degree of diligence, and would make the defendant liable for the want of it, that is, for ordinary negligence. Whether such negligence was or was not proved, was fairly left to the jury; * * * (p. 259), the Court took the pains to warn the jury that the result is not always a true criterion whether a man pursued a prudent course or not."

Substantially the same rule was adopted in the English cases that arose during the Franco Prussian

War, where vessels were uniformly held justified in taking steps by deviations and delays to avoid the risk of capture (The *Express*, L. R., 3 A. & E., 597; *The San Roman*, L. R., 3 A. & E., 583, 593; *Affd.*, L. R., 5 P. C., 301; *The Teutonia*, L. R., 4 P. C., 171; *Cargo* v. *Argos*, L. R., 5 P. C., 134; *Geipel* v. *Smith*, L. R., 7 Q. B., 404; see also *Bruce* v. *Nicolopulo*, 11 Exch., 129; *Exposito* v. *Bowden*, 7 E. & B., 763).

In the case of the *Express* (*supra*), a German vessel had loaded a cargo at Taganrog for Falmouth, England. On arriving at Algesiras, the master was informed of the outbreak of war between the North German Confederation and France, and was advised by the North German Consul at Gibraltar that the master would incur risk of capture from French men of war if he proceeded to sea. In consequence, the *Express* deviated and sailed to the port of Gibraltar, where she remained until the close of the war. No enemy cruisers were actually seen nor were there any in the immediate neighborhood. Action was brought against the ship by the owners of the cargo for damage to the cargo by delay and for loss of profit. In giving judgment for the ship *Sir R. Phillimore*, said (p. 605):

"I do not assent to the proposition that if the chances of capture and escape were equal the master was bound to proceed; but I think the former preponderated. It was contended that there must be what was called 'an actual operative restraint.' This would seem to indicate that nothing short of a blockade would justify the delay of the vessel to sail. I am not of this opinion. I think a reasonable prudent man, exercising due discretion and fortitude, would not have sailed, thereby exposing his ship to capture at that time."

In most of the English cases, the danger of capture was to the vessel itself, owing to its enemy character; accordingly, the steps taken to avoid it were putting into neutral ports and delaying the voyage until peace was declared, or the danger dis-

appeared. The damages in most cases were for delay. But in all cases the question was whether the steps taken were reasonable under the circumstances.

If, then, there was such a reasonable apprehension of seizure in the mind of the master as amounted to a restraint of princes, as both Courts below have found, it would seem that there was ample justification for the initial act of the master in relanding and storing the contraband cargo. The Court of Appeals so held, indeed. The opinion states (p. 344):

"Inasmuch as the master, where the contract was made in times of peace, could properly decline to carry forward a cargo which by the subsequent breaking out of a war had become contraband, we fail to see why he should not have the right to land such contraband cargo, with all proper precautions as to safe keeping, thus leaving his ship free to discharge its obligations to innocent cargo without risk of delay by reason of an actual arrest which would be caused only by the presence of such contraband cargo. The ship made no contract to carry contraband of war to the port of a belligerent, and should not be held to the obligations of a contract into which she has never entered."

But the District Court thought that the discharge of the cargo on April 27th was too hasty and that the master should have waited a reasonable period for satisfactory assurances that sulphur would be excepted from the list of contraband.

It is submitted that this cannot be the law. The circumstances on April 27th disclosed nothing that would have caused a reasonable man to believe that Spain would voluntarily permit the passage from Italy to the United States of so important a sinew of war as sulphur. What Spain did do from motives of policy or otherwise must be immaterial. The master might well have thought that sulphur would remain contraband so long as the war should last and the end of the war that had just begun was a thing no man could tell. It cannot be doubted

that the owners of the other cargo already shipped at Trieste would have had a just cause of complaint if they had been subjected to a delay of several weeks solely for the benefit of certain other cargo which was not lawful merchandise. Such delay as actually was experienced was unavoidable owing to the change effected in the character of the sulphur by the course of events. Possibly also the waiting cargo of about 40,000 boxes of fruit (fols. 480, 518) at Messina might have been damaged by the master's delay though it should have been determined by the District Court to be for a reasonable period only. If "the master as the agent for all concerned is still bound to a prudent regard for the interests of the cargo and 'must endeavor to hold the balance evenly' between ship and cargo, when their interests conflict" as the District Court maintained (fol. 942), at least the master must consider the interests of all the cargo, and not merely those of the contraband goods.

Much reliance apparently was placed by that Court on the case of the *Julia Blake*, 107 U. S., 418, but it is submitted that the application was altogether misguided.

The *Julia Blake* was a case where the master of a vessel which put into St. Thomas for repairs, issued a bottomry bond on the ship *and cargo* for the expenses of the repairs without communicating with the shipper or consignee, and without ascertaining whether the latter wished to take delivery at the port of refuge, or to have his cargo forwarded by another vessel. On a finding that either of these courses would have been of greater advantage to the cargo owner than to have had the cargo bottomried for ship's repairs, the Court decided that the master had acted improperly in hypothecating the cargo for the repairs to the ship without first communicating with the owner of the cargo. The Court said that the master acted in such a case as the agent for the owner of the cargo as well as for the shipowners.

This was a case where the owner of the goods had an option either to forward the goods by another ship or to contribute to the repairs of the "Julia Blake," so that the goods might be carried on that vessel. The action of the master deprived him of his rights to exercise this option.

In the present case, however, the owner of the sulphur had no option whatever. Under no circumstances could the *Styria* carry the sulphur forward at that time, nor would it have been fair either to the ship herself or to the non-contraband cargo to have had her wait at Port Empedocle until the war should be over.

The relanding of the sulphur did not prejudice its owners in any respect as to their rights to have the cargo forwarded by any other available means, and it is impossible to see what other course could have been followed out by the master with regard to the sulphur, even if he had been able to get in direct communication with the consignees.

The reference to the *Spartan* (25 Fed., 44, 56-58) is to some general remarks by the same Judge on the duties of the master with relation to the cargo. This is true also with respect to *L'Amerique* (35 Fed., 835, 844-846), cited by the District Court. The case of *A Cargo ex Argos*, L. R., 5 P. C., 134, 165, also contains a discussion of the duties of the master toward the ship and the cargo in unforeseen emergencies.

These cases hold that the master, in the language of Brown, *J.*, in *L'Amerique* (35 Fed., 845), "is not authorized to sacrifice the ship to the cargo, nor the cargo to the ship."

Nobel's Explosives v. *Jenkins* (1896) (2 Q. B., 326, 331-332), also cited by the District Court in this connection, although elsewhere (fol. 948) the Court says of it that "the facts were otherwise," is referred to at p. 42 of this brief.

None of these cases is authority for the suggestion that the master was not justified in relanding the sulphur. There was no question of sacrifice of the

cargo to the ship. The cargo had become contraband, and the ship could not lawfully carry it to New York. If the master had sailed with the sulphur there would have been a possible sacrifice of the ship and the non-contraband cargo to the sulphur.

The remaining case relied on by the District Court is the *San Roman*, L. R., 3 Adm. and Eccl., 583. In that case the vessel itself would have been subject to seizure if she had proceeded on her voyage, and it was held that the ship owner was justified in waiting till the danger to the ship was past. This is a very different proposition from the suggestion of the District Court that the ship *must* wait where there is a supposed danger to the cargo.

b. The conduct of the master was justified under the clause in the bill of lading which provided:

"In case of blockade or interdict of the port of discharge, or if, without such blockade or interdict, the master shall consider it unsafe for any reason, to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe at shipper's risk and expense, and on the goods being placed in charge of any mercantile agent or of British consul, and a letter being put into the post office, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense and the master and owners discharged from all responsibility" (fols. 756, 757).

The circumstances which the claimant contends amounted to a restraint of princes, have been considered in the first part of this point.

It was to avoid any possible uncertainty as to the proper and lawful course that the master should take in the event of the extraordinary circumstances that might, and in fact, did occur, that the above clause was inserted.

It contains no condition as to time. It gave the master the widest latitude of discretion to land

the goods whenever circumstances arose which in his judgment made it dangerous for him to proceed with the cargo to the port of destination and land it there.

In accepting the bill of lading the shipper or other agent of the property carried, expressly accepted and agreed to all its stipulations, exceptions and conditions (fol. 759).

It is not necessary for the claimant to contend that the shipper had consented to an arbitrary decision by the master. That situation is not presented here. But there can be no doubt that the shippers and their successors in interest did agree to a reasonable exercise of discretion by the master. The entire testimony in this case shows that the decision of the master was an honest one, made in the utmost good faith and with the intention of conserving the best interests of all. The master had heard and he believed that Spanish men-of-war were on the lookout for ships on the coast of Spain (fols. 493, 494), and he had also heard that New York was blockaded (fol. 462); the newspapers in Sicily reported that a ship laden with sulphur had been captured by Spain (fols. 501, 523).

If, with this information, the master had sailed and had been captured, it cannot be doubted that the owners of the non-contraband cargo and also of the sulphur would have had just cause to complain that the master had not acted prudently. There can be as little doubt that these same libelants who now complain because the master exercised his judgment one way, would have been equally clamorous against him if he had taken the sulphur, and the result had gone against them.

In the language of Mr. Justice Bradley in *Holladay* v. *Kennard* (1871), 12 Wall., 254, *ante* p. :

"The result is not always a true criterion whether a man pursued a prudent course or not."

It was contended in the Court below that this special clause in the bill of lading had no application

to the facts in this case because it was not unsafe actually to enter the port of discharge or to discharge cargo there after the port had been entered.

The decision in the case of *Noble's Explosives* v. *Jenkins* (1896), (2 Q. B., 326), is a complete answer to any such narrow construction of the language of the special clause. In that case, Mathew, *J.*, held that under this clause the vessel was justified in relanding the goods at Hong Kong because it was unsafe in the master's opinion to proceed on a voyage to Yokohama, Mathew, *J.*, said (at p. 331):

"There was a further clause in the bill of lading upon which the defendants relied, and which seems to me to afford a further answer to the plaintiffs' claim, which clause is as follows: 'If the entry of or discharging in the port of discharge shall be considered by the master unsafe by reason of war or disturbances, the master may land the goods at the nearest safe and convenient port at the expense and risk of the owners of the goods.' It was said that this clause was only intended to apply where difficulties arose upon the vessel's arrival at the port of destination. But I can see no ground for this narrow construction. The object was to enable the master to guard against obstacles which might prevent his vessel from reaching her destination in due course. There is no reason to suppose that it was intended to limit his discretion to the case where the information reached him on his arrival off the port of destination."

In this respect, that case is on all fours with the present cases, for there was absolutely no evidence in the *Noble's* case that there was any danger at the port of Yokohama itself, nor that the discharge could not safely have been effected if only the vessel could have reached that port.

If the danger through which the master had to pass to discharge the cargo at New York had been located in the near vicinity of that port, although there may have been no blockade whatever of the port, it could not seriously be contended that the master would not have been justified under this

special clause if he had failed to take the cargo there. It can make no difference in principle if in fact the danger was removed to a considerable distance from the port of discharge, but yet in fact was one that the master necessarily would encounter if he made the voyage. Any fair reading of the language used in connection with the purpose that it is evident the framers of the clause must have had in mind, would determine that the master would be justified in declining to prosecute the voyage if the circumstances were such as to give him a reasonable apprehension that his voyage towards the port of discharge, however he might make it, would be accompanied with danger to his vessel or to the cargo.

If the decision of the master that it was unsafe to proceed on his voyage was an arbitrary one, and was one which a resonably prudent and careful master would not have made under the circumstances, doubtless the master could not claim the protection of the clause. If, however, the master reasonably did have such belief of danger, and yet had proceeded on his voyage, the owners of the non-contraband cargo and possibly the consignees of the contraband cargo would have had just cause for complaint that he was not possessed of such prudence as they had a right to expect of a responsible master of a steamship.

One other suggestion of the District Court may be considered in this connection. It was said by the Court (fol. 945):

"But taking the circumstances altogether, I am of the opinion * * * that the master was guided in that matter [of the discharge] by the telegram from Burrell & Son, the managing agents in London, rather than by his own judgment on all the circumstances known to him at the time. Had he been left to his own judgment, I do not think, upon the testimony, that he would have discharged the cargo—especially not at the time he did."

The fact that the master received instructions from the managing agents of the ship, and that he obeyed them, would not be sufficient to take the case out of the conditions mentioned in the above clause, especially where it appears that the master himself did not think that it would be safe to take the cargo.

In the case of *Noble's Explosive Company vs. Jenkins*, previously referred to (p. 42), the bill of lading contained a clause phrased in practically the same terms as the one here under consideration. The master telegraphed to his owners for advice, and, on receiving instructions from them, landed the cargo. It did not appear what the master's personal opinion was. Yet his action in landing the goods was held justified under this clause.

In this case the instruction from the owners came first, but it was in direct accord with the master's own judgment.

Captain Scopinich labored under considerable difficulty in his examination as he was speaking in a language which was foreign to him, and in which he did not have great facility. A fair reading of his testimony, however, shows conclusively that he did consider it unsafe to take the cargo.

His evidence is as follows:

"Q. What was the reason for putting it ashore?
Mr. Hill: Objected to.
A. I acted according to instructions.
Q. Why didn't you bring it on to New York?
Mr. Hill: Objected to.
A. In fact, I didn't bring it, because I could see through the newspapers that it was contraband of war, although I acted on the owner's instructions to land the goods; for I would never have sailed with such a cargo, because I might be caught here by the enemy—your enemies, I mean.
Q. You mean by Spain? A. Yes, of course. Those are your enemies now, I suppose.
Q. Did your course towards New York take you anywhere near Spain? A. By all means. You have got to go near Spain, within a few miles, to sight the light-houses" (fols. 411-413).

"Q. Do you know whether it was actually contraband or not?

Objected to.

A. I know that it is for to make gunpowder. Everybody knows that.

Q. Do you know whether the Spanish Government considers or holds it to be contraband?

Objected to.

A. Of course it did hold it, because they were making understandings between Rome and Madrid about excluding sulphur from being contraband of war" (fols. 453, 454).

"Q. The only reason why you put this sulphur out at Port Empedocle was that you had some fear of difficulties between Spain and the United States? A. The reasons that I put the cargo on shore—it was because it was to carry my instructions out.

Q. And who gave you those instructions? A. The managing owners.

Q. And who were they? Burrell? A. Burrell & Son.

Q. Then they knew what you were doing, did they? A. They knew that I was to carry out instructions.

Q. The fact that you intended to, and did, put this cargo of brimstone out of the ship was known to Burrell & Son, was it? A. That I was landing the same?

Q. Yes. A. Of course it was not.

Q. And you did it by their instructions? A. Of course.

Q. And the reasons you have given other than that reason are mere impressions of yours, are they? A. No. Only to carry out instructions, that is all. I do not act on my own judgment.

Q. Not at all? A. No.

Q. Then these statements that you have made to us about contraband of war, and negotiations between Spain and Italy, and war between the United States and Spain, are merely given us for information as to your feelings at the time, are they? A. Merely to carry out—not merely—to carry out the conditions of the bill of lading.

Q. What does that mean? A. That means that when the master thinks it unsafe to proceed, and so on. You may read it. * * *

"Q. You think that under the clause of the bill

of lading you had a right to put this sulphur out of the ship at Port Empedocle, do you? A. When the war broke out" (fols. 458, 460).

"Q. You said a little while ago, I believe, on your direct examination, that you thought that it was contraband of war? A. I thought it was contraband of war.

Q. Why? A. Because I had seen what the papers reported about sulphur.

Q. Do you mean to say that you did not inquire whether sulphur was contraband of war at all? A. If I did not inquire?

Q. Yes. A. But there was a talk in town that sulphur was contraband of war.

Q. Did you make any inquiries of any people in authority as to whether sulphur was contraband or not? A. Not officially.

Q. You mean you heard gossip on the Exchange and in brokers' offices about it? A. Yes.

Q. And for your part, as you knew that brimstone was used to make powder, you thought it must be contraband. Is that it? A. Of course.

Q. And that is about all there is to it? A. Yes.

Q. It was your own notion, that is all? A. Also I had seen it in the papers" (fols. 470-472).

"Q. Now, Captain, you say that you put this brimstone ashore on instructions of the managing owners? A. Yes, and also because I knew that the war was there, and I acted on the bill of lading clause.

Q. You have testified, haven't you, that all this you did by orders? A. No. The principal reason was because I was ordered; and, secondly, that I had the bill of lading clause that fully authorized me when I deem it not safe to proceed with the cargo that was declared contraband of war.

Q. Do you want to change your testimony in that respect? A. No, I do not.

Q. Because you testified before that you were obeying orders? A. I said I acted on the owners' instructions, and also on the bill of lading clause.

Q. Won't you tell us what reason you had, other than the fact that there was a war, to consider it unsafe to enter, or attempt to enter, the port of New York? What other reason did you have besides? A. The reason that I had was that I was

passing close to Spain, and a man of war might stop me on my way.

Q. You didn't know anything about it except there was war? A. Yes.

Q. That is all? A. And then there was also in the newspapers, the Italian newspapers, that a man of war was there looking for ships" (fols. 491–494).

"Q. If you had not been instructed by the owners, would you not have waited to verify that before you discharged? A. Before I was instructed by the owners to sail with the sulphur I would have done so.

Q. And if they had not instructed you at all you would have waited to find out, wouldn't you, before you would have discharged the cargo? A. I don't know if I would; I couldn't tell you now what I would have thought over there.

Q. You could not tell what you would have done? A. No. It greatly depends how a man finds himself. Probably he would do a thing to-day and to morrow he would not do it.

Q. And you cannot carry yourself back so as to say what you would have done if you had not had instructions? A. No; I can't tell you now what I would have done then" (fols. 502, 503).

"Q. You did hear, didn't you, that vessels were sailing with sulphur? A. I didn't hear anything there. It is a small place; you don't get news. I seen in the papers that one had been captured; whether it was the truth I don't know" (fol. 523).

"Q. Did you, as a matter of fact, consider it safe to bring brimstone?

Objected to as immaterial, irrelevant and incompetent.

A. No, I did not think it safe. When you see in the papers the ships are stopped with sulphur you would not call it safe" (fol. 537).

"Q. But the day before you sailed, on the 7th, you did read in the papers that the Governments had come to an agreement—to an understanding? A. Yes; not to an understanding, not to a safe understanding, but a temporary understanding, you know.

Q. To the effect that sulphur temporarily would not be treated as contraband of war? A. Yes.

Q. In spite of the previous proclamation. That was so, was it not? A. Yes, but the papers said not officially confirmed, you see. That meant, of course, they could withdraw it any moment" (fols. 578, 579).

The master had no information on which he could rely safely prior to the date of the sailing from Port Empedocle that sulphur would be allowed by Spain to go free.

The position of the District Court seems to have been that if the master had waited until the 10th of May he would have had reasonable assurance that it would be safe to proceed on his voyage with the sulphur.

The Court said (fol. 946):

"Before he left Italy, although there was no formal publication of the exception of sulphur, there were such formal assurances coming from the Spanish government as left no reasonable apprehension of danger from sailing with a sulphur cargo. * * * By the 10th of May there was reasonable assurance that it would be safe to go on with the voyage and that this was not an unreasonable time for the ship to wait under the facts and circumstances currently known in Sicily at that time."

It is to be noted in this extract from the opinion of the District Court that while it is said that before the master left Italy there were assurances of safety, yet the date of such alleged assurance is given as the 10th of May. In fact, the master left Port Empedocle early on the morning of May 8th (fol. 447). If then the reasonable assurances were not received until May 10th, they were too late to come to the knowledge of the master. If, as has been contended hitherto, the master was not bound to wait after the sulphur had become unlawful merchandise, and the Court of Appeals have expressly held that he was not bound to wait any time whatever (p. 345), then on the finding of the District Judge that the assurances of safety of the sulphur were received on May 10th, there

could be no cause of complaint that the captain did not wait to get them.

The position of the Court of Appeals, on the other hand, was that while it may not have been the duty of the master "to delay action on the expectation that a belligerent would voluntarily abandon one of its weapons on no better assurance that such action would be taken than the statements of anonymous and irresponsible contributors to a newspaper published in a community which is extremely solicitous that such action be taken" (p. 347), yet they held that by May 6th the situation had changed and that the publication in a newspaper purporting to be from the Italian Minister of Agriculture, Industry and Commerce that the Spanish government had given notice to the commanders of its vessels to let sulphur pass free was an official declaration which the master should have accepted as sufficient, and that on receiving knowledge of this notice it was the master's duty to reship the sulphur, since the condition of affairs which made it contraband had ceased to exist (pp. 347-348).

This publication on May 6th was one of eight extracts from the journal of Sicily that have been offered in evidence as having come to the notice of the master. The newspaper is the same one that contained the "statements of anonymous and irresponsible contributors" to which the Court of Appeals referred (p. 347). Each issue of the paper covered two dates. It is impossible to state under which date of each issue the events were supposed to be recorded.

The first clipping was from the issue of the 24th and 25th of April, which stated that certain efforts had been made by merchants at Messina to induce the Italian government to secure the exclusion of brimstone from being considered contraband of war. (*Malcolmson's Ex. D 19*, p. 214).

The second, under date of the 26th and 27th of April, quoted another newspaper as confirming the fact that Spain included brimstone in the list of

contraband of war, but that the council of ministers had decided to try to induce Spain to revoke its decision (*Malcolmson's Ex. D 20*, p. 214).

The third, under date of the 27th and 28th of April, contained an inquiry from an Italian deputy of the Minister of Foreign Affairs whether the brimstone had been excluded from the list of contraband of war (*Malcolmson's Ex. D 21*, p. 214).

The fourth, under date of the 29th and 30th of April, stated that the Spanish government had not yet pronounced itself upon the Italian demand to exclude brimstone from the list of contraband of war; but that the Spanish Minister of Marine seemed decidedly averse to exclude brimstone; nevertheless, it stated that it was hoped that the Italian demand would be conceded (*Malcolmson's Ex. D 22*, p. 215).

The fifth, under date of the 1st and 2d of May, contained an absolute assurance from an anonymous person that the Spanish government had determined to exclude brimstone from the list of contraband of war. It also contained the state ment that the Official Gazette would publish the decision regarding brimstone, but that in the meantime the Spanish government had ordered the commanders of its ships to allow brimstone to pass free (*Malcolmson's Ex. D 23*, p. 215).

In point of fact, it does not appear that the decision regarding brimstone ever was published by Spain or in the Official Gazette.

The sixth clipping, under date of the 3d and 4th of May, stated that the Consulta had decided not to publish in the "Official Gazette" the Spanish government's decision regarding the exclusion of brimstone from contraband of war, but yet that the *Italian Minister* of the Interior had sent circulars to all the Prefects in Sicily informing them of the orders relative to the navigation of the cargoes of brimstone (*Malcolmson's Ex. D 24*, p. 216).

The seventh, under date of the 5th and 6th of May, was the notice which purported to have come

from the Italian Minister of Agriculture, Industry and Commerce. It was as follows:

"Chamber of Commerce, Palermo: I inform the Chamber of Commerce, for the useful information of merchants, that by the decree of April 23d of the Spanish government, are considered as contraband of war, arms, projectiles, fuses, powder, sulphur. * * * I would also state that in consequence of our request, the Spanish government has given notice to the commanders of its vessels to let sulphur pass free.

(Signed) COECO ORTU."

(*Malcomson's Ex. D 25*, p. 216.)

The eighth and last, under date of the 7th and 8th of May, stated that the Prefettura confirmed the statement that the exportation of sulphur might continue, and that the Spanish Government had officially declared in the circulars to the commandants of the ships that sulphur was not to be considered as contraband of war. It further stated that "An official and public declaration is lacking, but there is no doubt that sulphur will pass free" (*Malcomson's Ex. D 26*, p. 217).

It is to be noted that not one of these rumors or assurances purported to have come from a Spanish source. The assurance of the 6th of May, which the Court of Appeals called "an official declaration" (p. 348), was issued over the name of the Italian Minister of Commerce. Naturally it was for the interest of the Italians to continue to export sulphur, and to create the impression that it could be done with security to the carrying vessels. All statements emanating from Italian sources must be weighed with regard to that fact. In forming his judgment, the master did consider this circumstance, and also the further one that in the last issue of the paper that he saw prior to his sailing it appeared that an official and public declaration from Spain was still lacking.

The day the master sailed he saw a notice from the consul that there was a communication from the

Prefect that it was agreed between the two powers, Spain and Italy, that sulphur might go free; but the agreement was not given officially and was only a matter of verbal arrangement (fols. 532, 533, 575).

His judgment on this point, formed after long experience with Mediterranean peoples, was, "of course, the verbal arrangement you can't believe" (fol. 533).

The Spanish proclamation declaring sulphur to be contraband and giving public notice of the intention to confiscate it under any flag was a document of the most formal and official character. It was never modified by any declaration of the Spanish government officially promulgated, nor was there any official promulgation of any private agreement to exclude sulphur from the list of contraband by any other nation that may have been a party to such an agreement.

It now appears from the dispatch of May 10th from the British Foreign Office in reply to the inquiry of Burrell & Son, the managing agents of the vessel, that the Spanish Government stated that as a temporary measure the Naval Department had been ordered not to treat sulphur as contraband of war, but they laid stress on the fact that the measure was temporary only (*Styria Ex. D. 4*, p. 203). The date of these orders is not given.

This meant, of course, that the orders could be revoked at any moment. The master states that he so understood the situation and that the temporary agreement was not in his opinion a safe understanding for that reason (fol. 579).

It seems from the letter from the British Foreign Office to Messrs. Miller & Company, under date of July 8th, that this temporary measure not to treat sulphur as contraband of war was adopted by Spain on May 6th as a result of representations made by Breat Britain and Italy (*Styria Ex. D. 15*, p. 210), and that the Spanish Minister of Foreign Affairs had verbally stated this fact to the British and Italian Ambassadors at Madrid (*Styria Ex. D. 16*, p. 211).

It was not, however, until May 31st that it was stated by the Spanish Government that the temporary suspension of sulphur from the list of contraband of war would not be revoked without due notice (*Styria Exs. D. 10*, p. 207, *D. 12 and D. 13*, p. 208).

According to the letters from the United States Embassy at Rome and from the Assistant Secretary of the Department of State at Washington, it does not appear that any formal agreement was ever made between Spain and Italy regarding the removal of sulphur from contraband of war (*Malcolmson's Exs.*, 17 and 18, pp. 212, 213).

The very fact that on may 31st the Spanish Government announced that the temporary suspension of sulphur from the list of contraband would not be revoked without due notice gives rise to the almost conclusive inference that that Government did not feel that it would have been bound to give any notice whatever previously to that date, but that it might have revoked the suspension at will and seized any vessel that had sulphur on board, though such vessel had sailed in fancied security because of the early assurance of the Spanish Government. It matters not that the assurance never was revoked. It might have been, and Spain apparently reserved the right to do this arbitrarily. The master had to act in view of this contingency. The Court of Appeals suggests that if the Spanish Government had reconsidered its decision and seized sulphur ships the Italian Government would have had good grounds to claim indemnity, and in case of refusal would have had a *casus belli*. This may have been a very valuable right to the Italian Government, but it was not the practical kind of security on which the master would have been entitled to rest the interests of the owners of the ship and of the non-contraband cargo, who would have suffered great loss from the delay that would be consequent on a seizure of the vessel, if, indeed, that should be the extent of the loss.

It is doubtful whether the shipowners and the owners of innocent cargo would have been able to secure any substantial part of those rights which the Court of Appeals say Italy had. It is undoubted that they would not have been willing to accept this somewhat doubtful possibility of recoupment as a satisfaction of the master's duty and conduct toward them.

But it may be argued that the shippers of the sulphur were the parties who had the greatest interests at stake and that they protested against the relanding of the sulphur and would have assumed all risk of seizure if the master had sailed with contraband cargo.

According to the allegations in the libels the shippers had no interest in the sulphur at the time the protests were made. Whatever title, if any, they previously had, had been transferred to the libelants (fols. 770, 877, 898). Their protests, therefore, could have been no protection to the master in the event of seizure. They made no offer, indeed, to guarantee him against such risks nor against the loss that the ship and the non-contraband cargo would sustain in the event of seizure. One of the protests suggested that there was a modification of the original Spanish proclamation that sulphur was prohibited but admitted that an official and public declaration was wanting and yet protested because the master did not rely on the rumor of safety.

After the end of war, and in the peaceful security of its chambers, a court may look back on the events of the time and find that they were fraught with less danger than was then apparent. But the master's situation was different. He had actual present responsibilities to discharge, and he had to act in the way which he regarded as the best for all the interests that were in any way entrusted to his charge.

It is not believed that any Court would have sanctioned the conduct of the master, as reasonably

prudent if, under the circumstances as he knew them, he had sailed with the contraband cargo and the ship had been stopped by Spain.

The conclusion would follow from the argument under this point that if the master's action in relanding and storing the sulphur, and sailing for New York without it, was justified under either of the two clauses (a) or (b) of the bill of lading, all the expenses incurred with respect to the sulphur would fall on the owners of the cargo, as necessarily involved in the changed nature of the cargo, under the circumstances.

III.

The steamer is exempt from liability for these claims by force of the Third Section of the Harter Act.

The third section of the act of February 13, 1893 (2 Supp. R. S., p. 81), provides that if the owner of any vessel shall have exercised due diligence to make the ship seaworthy, &c., neither the vessel nor the owner shall be liable for faults or errors in navigation, or in the management of the vessel, and continues,

"Nor shall the vessel, her owner or owners, charterers, agent or master be held liable for losses arising from dangers of the sea, or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried." * * *

The statutory exemption of "losses arising from * * * public enemies" appears to be the legal equivalent of the exception in the bill of lading of losses due to "restraints of princes," as to which an argument has been presented under the prece-

ding point. If that argument is well founded, it will be decisive of the case.

If, however, the Court should be of the opinion that the loss complained of was not due to a "restraint of princes," within the sense of that exception in the bill of lading, because the restraining force was not immediately and actively exerted against the vessel, exemption may nevertheless be claimed under the statute, because the loss was one "arising from the inherent * * * quality or vice of the thing carried."

The contraband quality of the sulphur was the sole cause of the losses that are here in controversy. If it had been lawful cargo, it would never have been relanded, and if it had not been useful for war purposes, it is improbable that the outbreak of the war would have enhanced the price so materially, or that the delay that occurred in bringing it forward would have resulted in any substantial loss. It was the inherent quality of the cargo that caused the price to rise with the outbreak of war, and to fall back again with the conclusion of peace.

The question under this point is, can the loss be fairly regarded as one "arising from the inherent defect * * * or vice of the thing carried"?

It is not to be assumed that this exemption is intended to be limited to material deterioration of cargo, owing to its inherent quality or vice. Losses from such causes would, of course, be within the exemption. But any other loss, which may be attributed fairly to the quality of the cargo as its cause, should be equally within the protection of the act.

The loss here in controversy arose from the nondelivery of the goods by the *Styria*. If the nondelivery by the *Styria* was owing to the inherent quality of the sulphur, it would seem that the loss that was caused by it is one "arising" from the quality or vice of the cargo.

The act of relanding the sulphur at the point of shipment was due solely to its contraband quality.

The loss that arose from such relanding was immediately and proximately caused by the nature of the goods. Unless the master's act cannot be justified as a reasonable exercise of judgment, under the circumstances, it would seem that the loss may fairly be dealt with as one "arising from the inherent quality or vice" of the cargo, and hence within the protection of the statute.

The subsidiary question whether the act of relanding the cargo was founded on good judgment, has been discussed in the preceding pages of this brief. The argument on that branch of the case need not be repeated here.

If the statute is applicable, and the loss is regarded as having arisen from the inherent quality or vice of the cargo, the expenses at Port Empedocle, as a part of the loss, would attach to the cargo by force of the statute and of the stipulation of August 12th (p. 13).

IV.

The master had the right, under the transshipment clause (*c*) of the bill of lading, to reland and transship the goods. As this was done ultimately at the ship's expense and, so far as appears, within a reasonable time, she should not be liable for damages that were incident to delay in the transshipment,

The argument under the preceding points has proceeded on the theory that the master was justified in relanding the contraband goods at the port of shipment, and that the expenses incident thereto should be borne by the goods. If the master's action can be justified on any of the grounds stated, it is unnecessary to consider the import or legal effect of the transshipment

clause. If, on the other hand, it be considered that he had no right to reland the cargo at its own expense, either because its character changed with the outbreak of war, or by reason of the exceptions (*a*) or (*b*) of the bill of lading (*ante*, p. 4), or of Section Third of the Harter Act, the shipowner may still claim the benefit of the transshipment clause in the bill of lading, but with the result that the expenses incident to the transshipment would have to be borne by the ship.

The liberty to transship appears twice in the bills of lading:

"Shipped in apparent good order and condition by [the different shippers] in and upon the steamship called the Styria, whereof Scopinich is master, for this "present voyage, and now lying in Port Empedocle, and bound for New York [certain parcels of sulphur], with liberty to call at any port or ports in any rotation in the Mediterranean, &c., * * * for the purpose of receiving and delivering coals, cargo or passengers, or for any other purpose whatsoever, * * * and with liberty to transship any part of the cargo by steamer" * * * (fols. 738–741).

Then follow certain stated exceptions to the shipowner's liability (fols. 741–743), concluding with a restatement of the liberty to transship, in these words:

"With liberty (in event of steamer putting back to this, or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or transship the goods by any other steamer" (fols. 743–744).

After the cargo had been laden, the bills of lading had been issued for it and the ship had been cleared from the Custom House at the port of shipment, and while she lay in the roadstead off the port, a determination was reached to reland the sulphur, and store it because of its hostile character; and sub-

sequently, pursuant to an agreement between the parties (p. 13), it was transshipped by the shipowner on another steamer and delivered to the original consignees at New York under the terms of the original bills of lading (fol. 60).

It was not alleged, nor proved, that there was any unreasonable delay in transshipping the sulphur, or that there was any opportunity to transship it at an earlier time.

On these facts the claimant is entitled, if the defenses hereinbefore urged are not sustained, to have the benefit of the transshipment clause (*The Surrey*, 26 F. R., 791, 793; 40 F. R., 90; *Stewart* v. *British & African Co*., 32 L. T. Rep., 257; *Carali* v. *Xenos*, 2 F. & F., 740), and to be absolved from all further liability on being charged with the expenses that were incident to the transshipment.

The District Judge was apparently of the opinion that this clause might have been applicable to the case, though, in the view that he took of it, without advantage in the result to the defendant, because, as the case stood before him, it did not appear that the ship would be called on to pay any damages, and under the transshipment clause, the expenses incident to the transshipment would be chargeable to the vessel. The reason that he assigned for disregarding the clause, in reaching his final conclusion, was that the master, at the time, stated that he based his action on grounds which indicated that he relied on clauses (*a*) and (*b*) of the bill of lading, rather than on clause (*c*). The full statement of the District Judge's views, with reference to this clause, here follows:

"The defendant also invokes the liberty to transship under clause (*c*) of the bill of lading above quoted. This is a clause which is, no doubt, designed for the benefit of the ship alone in any emergencies that might call for the exercise of the option given. That clause might, perhaps, have been applicable in the present case, though without advantage in the result to the defendant, since the defendant would under this clause alone stand charge

able with all the expenses of discharge, storage and reloading. It was doubtful how long the vessel might be detained before it could be ascertained and determined whether a contraband cargo could be carried with a reasonable prospect of safety or not. The ship may, therefore, have had the option under this clause, in conjunction with clauses (*a*) and (*b*) above referred to, to discharge the cargo immediately and store it, as she did, rather than incur a certain loss by detention of the vessel for a more or less indefinite period while waiting until it was found safe to proceed; and while thus discharging at once, she might leave it to the chances of future events to determine against which interest, whether of ship or cargo, the expenses should be charged. If the result should show that the vessel would have been detained an unreasonable time before she could have safely sailed, then the expense would properly fall on the cargo, because the discharge would have been justified by the danger clauses (*a*) and (*b*); but if, on the other hand, it should turn out that the vessel might have safely sailed within a reasonable time, having due reference to the interests of both ship and cargo, then the discharge could not be justified under clause (*b*), but under clause (*c*) alone; and any such transshipment being at her own option and for her own convenience all the expenses of discharge, storage and reshipment would fall upon the ship, as in any other case of a transfer and reshipment under clause (*c*).

"In this case, however, the discharge was stated by the master at the time to be based upon his rights under clauses (*a*) and (*b*) only; and the various clauses of the agreement subsequently made between the parties, under which the cargo was brought forward, seem based upon the same assumption" (fols. 948-951).

The Court of Appeals expressed no opinion as to the force and effect of clause (c), though that clause was urged on its attention, both on the oral argument, and in the brief, as it had been in the District Court.

If the clause might have been applicable in any view, under the facts as they existed at the time the cargo was relanded and stored at the port of ship-

ment, the shipowner should not be deprived of the benefit of it because the master did not specifically, at the time, base his action on it, or claim whatever rights he might have had under it in justification of his conduct. (*The Willowdene*, 96 Fed., 569, 576.)

The master did not base his action specifically on any particular clause, or clauses of the bills of lading. He stated that he acted because of "facts of war," and under the faculty reserved to him by the bills of lading (fols. 427, 443). But even if he had erred in basing his action on one clause of the contract instead of another, his error should not prejudice the shipowner's actual rights. The situation at the time was one of extreme difficulty and uncertainty and, in the absence of some very specific waiver, the Court should not by inference deprive the shipowner of the benefit or protection of any of the clauses in in the contract.

The Court of Appeals has found that the master had a right to unload the cargo when he did (p. 344). It has held the ship liable because the master did not reship the goods on the *Styria*. But if the contract contained in the bills of lading was still in force, the shipowner had the right either to reship on the *Styria* or to transship by another vessel.

It was determined not to reship the goods by the *Styria;* and, whatever the shipowners' intention may have been at that time, owing to the unsettled conditions due to the existence of the war, they subsequently did transship the goods, and did so under the terms of the original bills of lading (fol. 60).

This course was within the shipowner's right under the bills of lading, as well as in pursuance of the stipulation of August 12, 1898. Unless the shipowners were in fault for failing to make the transshipment at an earlier date, the libelants would not be entitled to any damages incident to or that were caused by the transshipment when it was made, even though such damages, or some part of them, might have been avoided by an earlier transshipment. The libelants have offered no evidence that

it was reasonably practicable to ship the goods at an earlier date, or that there were facilities which reasonably ought to have been availed of to move the cargo forward at some earlier period.

In the absence of such proof, it should be assumed that the transshipment was made within a reasonable time, and was within the liberty conferred by the bills of lading; and, as the shipowner has paid all the expenses incident to the transshipment, except the charge for storage, there should be no recovery, in any view, except possibly for that item of expense which was taken in kind from the sulphur prior to its transshipment.

V.

The measure of the libelants' damages, if the master was not justified in acting as he did.

It has been contended in the previous points that the ship has fully discharged all her obligations to these libelants.

If, however, it should be held that the master's action was ill advised and wrongful, either in discharging and storing the sulphur in Italy, as the District Court held, or in failing to reload it on May 6th and bring it forward on the Styria, as the Circuit Court of Appeals determined, then it would be material to consider the measure of the damages sustained by the libelants in consequence.

In either view the result to the libelants should be the same.

1. Inasmuch as the contentions as to the actual issues varied in the courts below, from time to time, it is necessary to determine what the issues were as framed by the pleadings.

The libels were filed on June 4 (fol. 23), June 6

(fol. 100), June 4 (fol. 156), and June 7 (fol. 214), respectively, for the non-delivery on June 3d of certain quantities of sulphur that had been shipped on the Styria to be transported to New York. The positions and relative rights of the libelants and the claimant were fixed for the purposes of these suits at that time, and only those damages, if any, could be recovered by the libelants, which were asked for at the respective dates of the filing of the libels.

The libel of Morgan was "in a cause of contract" (fol. 18), and alleged the shipment on the Styria of brimstone, the property of libelants; that the master "executed and delivered a bill of lading for said brimstone, to which the libelants beg leave to refer and make a part of this their libel" (fol. 20), by which it was agreed that the brimstone should be delivered in New York, but that the vessel proceeded to New York without the said cargo. Wherefore the libelants claimed damages.

This action, therefore, was on contract and the damages which were asked for were for the breach of that contract by reason of the non delivery of the brimstone.

The libel of Parsons was in a "cause or contract" (fol. 66), and alleged the shipment of brimstone on the said steamship, and that the shippers received from the "master three bills of lading, receipts and contracts * * * whereby the master charged his body and goods, and also the said vessel * * * for the performance of the said contract, a copy of which is hereto annexed" (fol. 67).

These allegations were repeated as to a second shipment at the same time and place, and the libel further alleged the endorsement of the bills of lading to the libelant who became the lawful owner (fol. 70), that the vessel arrived at New York, but yet "the said master has not delivered the said merchandise to the said libelant" (fol. 71). The libel further alleged that the "master has neglected and refused to deliver the said goods and has converted the same to

his own use whereby the libelant has sustained damage" (fol. 71).

This action also was for breach of contract, and damages were asked for as for a conversion (fol. 72).

The libel of Malcomson was in a "cause of action" (fol. 126), and alleged the shipment on the steamer of brimstone, and that the shipper received "from the said master bills of lading, receipts and contracts whereby and wherein the said master charged his body and goods and also the said vessel * * * for the performance of said contract, a copy of which is hereto annexed" (fol. 128).

The libel further alleged that the goods were the property of the libelant by endorsement of the bill of lading, and that the steamer arrived in New York, but "the said master has not delivered the said merchandise to the libelant, but to deliver the same has refused and still does refuse whereby the libelant has been damaged" (fol. 130).

This action also was on contract and the breach alleged was the refusal of the master to deliver the cargo as agreed.

The libel of Munroe was in a "cause or contract" (fol. 182) and alleged the shipment of brimstone to be delivered at New York to the libelants, and that the shippers received "from the said master three bills of lading, receipts and contracts * * * wherein he charged his body and goods and also the said vessels * * * for the performance of said contract, a copy of which is hereto annexed" (fol. 183). The libel further alleged the arrival of the vessel at New York, "but the said master has neglected and refused to deliver the said goods and has converted the same to his own use whereby the libelants have sustained damage" (fol. 185).

This libel also was filed for a breach of contract by reason of the failure of the master to deliver the brimstone as agreed, and it asked for damages as for a conversion.

All these actions sound in contract. Each one of the four libels refers to the bill of lading as the con-

tract under which the sulphur was carried and either annexes the bill of lading to the libel or otherwise by reference makes it part of the pleading.

Of the four libels, one alleges non-delivery through failure of the ship to carry the cargo (fol. 21), another alleges refusal of the master to deliver (fol. 130), and two allege conversion (fols. 72, 185).

The answers of the claimant are uniform in all the cases. They allege the master's justification for his action (fols. 31, 39); the defense of restraints of princes (fol. 40); the defense under the clause in the bill of lading that provides that "the shipowner is not to be liable for any damage to any goods which are capable of being covered by insurance" (fol. 40); the defense under the clause in the bill of lading that the shipowner is not to be liable in any case for more than the invoice or declared value of the goods, whichever shall be least; the defense under the Italian law which prevailed at the port of shipment, according to which the shipowner could withdraw from his contract of carriage without becoming liable in damages, if war has been declared, so that in consequence the goods to be carried could no longer be considered free.

In connection with the defense limiting the shipowner's liability in any case to the invoice or declared value of the goods whichever shall be least, the claimant sets out (fol. 42) the stipulation of August 12 (fols. 57–64, Brief, p. 13), alleging that the cargo has been brought forward under it and sold by the libelants, and "that libelants have realized, by the sale of the said sulphur, more than its invoice price, and that, accordingly, under the above quoted provision of the bill of lading, the libelants have not suffered any damages in the premises which are recoverable in this action" (fols. 42, 43).

The effect of this stipulation will be considered more particularly hereafter. It is important in this connection, however, as showing that the claimant

did not consider that the case as stated in the libels was varied in any way by the stipulation, except that the ship thereby became entitled to credit the proceeds of the sale of the sulphur against the libelant's claim for non-delivery, and it was contended that this claim must be limited to the invoice value.

The issue as met by the answer in these cases was one of non-delivery of the goods to the libelants, and not one of delay in delivery. When the libels were filed the libelants had not received their goods, and they asked for damages accordingly—*propter rem ipsam non habitam*, as the civilians say. It must have been quite immaterial to them where the goods were and how they had been disposed of or what had become of them inasmuch as they themselves did not have them.

It would have been impossible for the libelants to have brought suit at the time when the libels actually were filed if they had been suing for their damages by reason of delayed delivery. There was nothing to indicate at that time that the sulphur ever would be brought forward nor what its value would be when that had been done. If there was any thought that the sulphur would eventually be carried by the owners of the *Styria*, on that vessel or on some other ship of their line, conceivably it would be worth on its arrival far more than it would have been if it had arrived on the *Styria*, in June, 1898. What, if any, damage the libelant would have suffered by reason of delay merely, it is impossible to state. Certainly under the supposititious conditions there would have been no loss of market.

If the libelants had sued for damages sustained by them by reason of their inability to carry out contracts that they might have made with regard to the sulphur, they, doubtless, would have pleaded such facts or shown them on reference to ascertain the damages. Nothing of the sort was done.

It must be taken conclusively that the libelants also did not consider that the nature of the case had

in any way been altered by the stipulation of August 12. The sulphur had been brought forward on the *Abbazia* and had arrived at New York on September 30 (fol. 648). The answers had all been filed on December 1, 1898 (fols. 64, 125, 179, 238).

The libelants did not make any move to amend their pleadings after the sulphur had been brought forward under the stipulation, nor did they take any exception to the answers in which the stipulation had been pleaded nor was there any suggestion by them at any time that by reason of the stipulation the nature of the actions had been changed from the original claim of damages for *non-delivery* to the theory of damages for *delay in delivery*.

Disregarding, therefore, for the moment the effect of the stipulation the case will be discussed on the issues raised by the pleadings and as if there had been no stipulation. It will then be considered whether or not the stipulation can affect the principles which otherwise would control the case and if so, to what extent.

2. It has been shown that the gravamen of each libel is the non-delivery of the brimstone or sulplur as agreed by the master. There was, therefore, a total breach of contract in each case and the libelants were entitled to those damages and only those damages which the shipowner would be bound to pay for a total breach, as of the date of the arrival of the *Styria* at New York.

It is not material to consider whether or not the libelants might have brought actions of tort, nor whether they would have any greater rights in that event. It is sufficient that they did not do so.

The contracts in all the cases were practically the same. They are evidenced by the bills of lading which were executed by the master for each shipment and were referred to in each one of the libels (*ante*, pp. 74–76). These bills of lading all contained the same terms, exceptions and conditions (fols. 405, 738). The originals were produced by the libelants,

at the request of the claimant, on the examination of the master (fols. 399–404).

The identical form is given at folios 739–762.

One of its conditions, and, therefore, a part of the contract in each case, is the following (fol. 753):

"The shipowner is not to be liable for any damage to any goods which are capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods, nor for claim for damage or detention to goods under through bills of lading where the damage is done or detention occurs whilst the goods are not in the possession of the Shipowner, *nor in any case for more than the invoice or declared value of the goods whichever shall be the least.*"

The bill of lading also contained the clause:

"NOTICE.—In accepting this bill of leading, the shipper or other agent of the property carried, expressly accepts and agrees to all its stipulations, exceptions, and conditions, whether written or printed" (fol. 759).

Under these provisions of the bills of lading, if a liability is adjudged under the issues stated in the pleadings, the libelants would be entitled to recover damages as for a total loss.

3. The clause restricting the liability of the shipowner to the invoice or declared value of the goods is valid and is applicable to a case where the loss or damage has arisen from the carrier's negligence. Such a clause has been so adjudged by this Court in *Hart* v. *Pennsylvania R. R. Co.* (1884), 112 U. S., 331, and in *Calderon* v. *Atlas Steamship Company, Limited* (1898), 170 U. S., 272, 278.

In *Hart* v. *Pennsylvania R. R. Co.*, the plaintiff sued the defendant as common carrier for breach of a contract to transport five horses and other property from Jersey City to St. Louis. By the negligence of the defendant one horse was killed and the others injured, and the other property was de-

stroyed. The plaintiff offered to show that the actual value of the horse killed was $15,000; that the other horses had been worth from $3,000 to $3,500 each, but had been rendered worthless in consequence of their injuries. The defendant objected to this testimony on the ground that it was not competent for the plaintiff to prove any damage or loss in excess of that set out in the bill of lading. The Court sustained the objection and the plaintiff excepted.

It appeared on the trial that the horses were race horses, and that they and the other property were in one car.

The bill of lading under which the property was transported, contained this clause:

"To pay freight thereon to said Company at the rate of ninety-four (94) cents per one hundred pounds (Company's weight) and all back freight and charges paid by them, on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules not exceeding $200 each. * * * If a chartered car on the stock and contents in same, $1,200 for the car load."

The above clause was not previously agreed to between the parties, but was inserted in the bill of lading by the carrier as a statement of the extent to which he assumed liability.

It was held by this Court that the evidence as to value was rightly excluded.

Mr. Justice Blatchford, in delivering the opinion of the Court (p. 337), said:

"It is further contended by the plaintiff that the defendant was forbidden, by public policy, to fix a limit for its liability for a loss by negligence at an amount less than the actual loss by such negligence. As a minor proposition, a distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property and a rate of freight is fixed accordingly, and the present case. It is said that, while in the former case the shipper may be confined to the value he so fixed, in the

event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the 'agreed valuation,' the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation and that the liability should go to that extent and no further.

* * *

(p. 240.) "It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. *The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation between the parties to the contract. The parties must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld.* There is no violation of public policy. On the contrary, it would be unjust and unreasonable and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

To the same effect—

The *Hadji*, 18 Fed. R., 459, and cases cited.

The *Alene*, 23 Blatchf., 335, 346, was another case where the invoice value clause in the bill of lading was upheld against the consignee.

The libel in that case was filed for negligent injury to cargo. A quantity of oranges had been discharged from the steamship at an improper time when it was so cold that the fruit became frozen. The oranges were sold at auction by the Government at a sum not sufficient to pay the freight and duty. The oranges had been shipped by three shippers, of whom the libelant was not one. The libelant was the consignee in the bills of lading, which provided: "The company will not become liable for any value exceeding one hundred dollars ($100.00) upon each of the above named packages, unless the value is declared at the time of shipment, and so expressed in this bill of lading, and extra freight thereon paid, nor in any case for an amount exceeding the invoice cost thereof."

In the District Court the libelant was held entitled to recover the market value of sound oranges at the time of delivery. This amounted to $5,784.01. On appeal to the Circuit Court it was held that the libelant could recover only the invoice value, which was $1,832.76, less the freight.

Blatchford, *J.*, said (p. 346): "In accepting each bill of lading, the shipper accepted the terms of the contract it contained, and the libelant cannot now be heard to say that the shipper did not know its contents, or received it after the shipment, or that he did not know its contents or that the clause as to invoice value has been waived in other cases. The provision that the claimant shall not be liable in any case for an amount exceeding the invoice cost of the oranges is distinct."

A limitation clause has also been upheld where there has been no expressed valuation.

In *Belger* v. *Dinsmore*, 51 New York, 166, a trunk containing articles of the value of $467 was delivered to a carrier. The receipt, accepted for it, by the

shipper, contained a condition that "nor in any event, shall the holder herein demand beyond the sum of Fifty Dollars, at which the article forwarded is hereby valued; unless otherwise herein expressed, or unless specially insured by them and so specified in this receipt; which insurance shall constitute the limit of liability of the Adams Express Company."

There was no valuation of the property so delivered, nor of any part thereof expressed in the said receipt, nor was it specified therein that the same, or any portion thereof, had been specially insured. The trunk was lost. The Court said (p. 173):

"The plaintiff in this case must be assumed to have paid freight on the trunk in question, and its contents, worth $467 at the rate prescribed for an article not exceeding $50 in value. He was then willing and agreed to assume all risks for the excess in value and to relieve the company from liability on account thereof, beyond that sum. He can with no more propriety or justice claim remuneration therefor, than the company could demand additional freight therefor."

In *New York Central & Hudson River Railroad Co.* v. *Fraloff* (1879), 100 N. Y., 24, 27, Mr. Justice Harland said:

"It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon adititional compensation proportioned to the risk."

In *Westcott* v. *Fargo* (1875), 61 N. Y., 542, Dwight, *C.*, said (p. 551):

"The true question in the cause concerns the effect upon the grantees of the stipulation that the defendant should 'not be liable for any loss or damage of any box, package or thing for over fifty dol-

lars, unless the just and true value is herein stated.'

It must be conceded that this stipulation, under the circumstances of this case, is a part of the contract and is binding on the plaintiff. This is decided in *Belger* v. *Dinsmore*, 51 N. Y., 166, and in *Steers* v. *Liverpool Steamship Co.*, 57 N. Y., 1."

In *Alair* v. *Northern Pac. Co.*, 53 Min., 160, the Court said that if a stipulation as to the value of the property is "fairly and honestly made as the basis of the carrier's charges and responsibility, then we think it ought to be upheld as a just and reasonable mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant claims." The Court further said that it made no difference whether the value was fixed at a specified sum, or at not more than a stated amount; and that it was not material whether the valuation was one previously named by the shipper, or that inserted in the contract by the carrier. In any event, if the contract was fairly made, it limited the liability of the carrier, regardless of whether the loss occurred through its negligence or not.

In *Durgin* v. *American Express Co.*, 66 N. H., 277, the Court, in a case of loss by negligence, said:

"The defendants agreed to respond in a sum not exceeding $50, in case of loss, and, for the purposes of the contract of transportation, between the parties to the contract, the goods have no further value."

Many cases have held that a stipulation that the measure of damages shall be the *market value of the goods, at the time and place of shipment*, instead of at destination, is valid, if freely and fairly entered into, and is applicable to cases of losses arising from negligence (*South & North Ala. R. Co.* v. *Henlein*, 52 Ala., 606; *South & North Alabama R. R. Co.* v. *Henlein & Barr*, 23 Am. Rep., 578; 56

Ala., 368; *Louisville Ry.* v. *Oden*, 80 Ala., 38; *Chicago Ry.* v. *Hannon*, 17 Ill. App., 640; *Caples* v. *Louisville Ry.*, 17 Mo. App., 14; *Rogan* v. *Wabash Ry.*, 51 Mo. App., 665; *Hutchinson on Carriers*, § 249).

The carrier's liability may also be limited, by the bill of lading, to a named sum (*Muser* v. *Holland*, 17 Blatchf., 412; *Coupland* v. *Housatonic Ry.*, 61 Conn., 531; *Belger* v. *Dinsmore*, 51 N. Y., 166; *Zimmer* v. *N. Y. Cent.*, 137 N. Y., 460; *Alair* v. *Northern Pacific*, 53 Minn., 160; *Johnston* v. *Richmond Ry.*, 39 S. C., 55; *Squire* v. *N. Y. Cent. Ry.*, 98 Mass., 245; *Graves* v. *Lake Shore Ry.*, 137 Mass., 233; *Hill* v. *Boston, &c., Ry.*, 144 Mass., 284; *Richmond, &c., Ry.*, v. *Payne*, 86 Va., 481).

As was said by Brown, *J.*, in *The Denmark*, 27 Fed. R., 141:

"The right of a carrier to protect himself against claims for extraordinary damage by stipulaling for notice of articles specially valuable in order that special care may be given to them and to require the payment of a proportionate compensation, is now too well settled to be questioned. Muser *v.* American Exp. Co., 1 Fed. Rep., 382; The Hadji, 18 Fed. Rep., 459; Hart *v.* Pennsylvania R. Co., 112 U. S., 331; s. c., 5 Sup. Ct. Rep., 151; Magnin *v.* Dinsmore, 70 N. Y., 410."

The reason for the rule is well stated in Mr. Reed's original brief for Parsons (p. 20) filed in the Court below, where he says:

"The limitation is held justified, in the reported cases which lead the way, on the ground that thereby speculation as to the shipper's possible profits in the port of destination is eliminated, and if he is made whole, justice is done, if the parties so agree."

The contention was made in the Court below by the libelant Parsons that the rate of freight was the same for all the brimstone, although it was of different grades which had different values, and consequently the rate of freight could not be regarded

as depending on the value. In fact, the freight rates shown in the bills of lading are not identical. For instance, in the consignment to Parsons there were brimstone seconds on part of which the freight was seven shillings and sixpence a ton (fol. 68). In the consignment to Malcolmson there were some brimstone thirds on which the freight was six shillings and sixpence a ton (fol. 139). It is true that in some instances the freight was the same on both seconds and thirds, but as the difference in valuation between seconds and thirds was very slight it may well have been disregarded.

Any slight variation in the freight rate may also be accounted for by the fact that the shipments were made by different firms (fols. 19, 77, 134, 191), and the contracts for the shipments doubtless were made at different times during which the freight rate was not constant.

This consideration, however, was passed on directly by this Court in *Hart* v. *Pennsylvania R. Co.* (*ante*). In that case it appears that the agreed valuation was not the invoice value, but "if horses or mules, not exceeding two hundred dollars." The Court will take judicial notice, perhaps, that there is more opportunity for variation in the value of horses than in brimstone in which there are but a few grades. Nor are horses and mules interchangeable terms nor are the animals of interchangeable values. In that case the plaintiff attemped to show that the horses were worth much more than the sum of two hundred dollars. He was not permitted to do this

Blatchford, *J.*, said as to this:

"It must be presumed, from the terms of the bill of lading and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation. Especially is this so as the bill of lading is what its heading states it to be, a limited liability

live stock contract, and is confined to live stock. Although the horses, being race horses, may, aside from the bill of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed; and it is not asserted that the plaintiff named any value greater or less, otherwise than as he assented to the value named in the bill of lading by signing it. The presumption is conclusive that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation, on the agreed rate of freight."

It would seem therefore that these cases are on all fours with *Hart* v. *Pennsylvania R. Co.* as to the applicability of the limitation of liability clause to the facts in the cases.

In the cases here under consideration, which also are for damages for a total loss, the libelant was permitted to show the high value of the sulphur. It would seem that this was manifest error.

The valuation here was the invoice value. That was a definite sum, and was in fact fixed by the shippers. After it had been so fixed it was incorporated in the bills of lading and constituted the "agreed valuation," under the language of Mr. Justice Blatchford, quoted above, as distinctly as if the figures of the invoice value had been inserted.

It was contended in the court below that the invoice value clause had no application to the facts in this case inasmuch as certain claims specified in the clause did not meet the situation here. It is submitted, however, that this contention rests on a misreading of the language of the clause. Certain kinds of damage, indeed, are specified which probably

would cover the ordinary claims that would be made on the carrier. The framers of the clause apparently had in mind, however, that every possible kind of claim could not be specified in advance, and for that reason they added the words "*nor in any case* for more than the invoice or declared value of the goods, whichever shall be the least."

The paragraph taken as a whole is not composed of alternative clauses relating to a single sort of loss and dependent for their applicability on the particular circumstences specified. The words "in any case" were evidently intended to cover any possible case that could arise; if they were not, it is difficult to attach any meaning to them whatever.

If the clause is applicable to a case of negligence as decided by *Hart* v. *Pennsylvania R. Co.*, it can make no difference whether the negligence resulting in the loss was due to inaction by the carrier or to ill-advised or intentional action, if only the bounds of good faith have not been exceeded by the carrier. If the carrier has not been guilty of fraud the owner of the goods can have no greater nor different rights against the carrier, though his misconduct was willful than if it had been unintentional. It may well be that if the carrier's breach of contract was fraudulent, he would lose any benefit of the contract that he had made with the skipper. But that situation is not presented here. There is no suggestion that the master of the *Styria* or the owners of the vessel had any intent to defraud the owners of the sulphur when he relanded it at Port Empedocle. The master testifies that he thought it was unsafe to carry the sulphur, or as he stated in his notice sent to the shippers of the sulphur, "on finding risky my passage to New York with the actual sulphur cargo, for facts of war" (fol. 427); he accordingly sent the sulphur ashore. The Court of Appeals held that the master was justified in relanding the sulphur when he did (p. 346)

The District Judge thought that the action of the

master was too hasty (fol. 945). The Court does not find, however, nor is there the slightest suggestion in the case that there was any bad faith exercised on the part of the ship. So far as the owners of the *Styria* are concerned, if it should be considered that they in any way influenced the action of the master, there is no doubt that they were actuated solely by a regard for the safety of the non contraband cargo and of the ship.

The question of fraud, therefore, being eliminated, the libelants are to be regarded as in no better position than they would have been if the Styria had made the voyage with the cargo on board and had gone to the bottom, because of negligent navigation. That is to say, such a view would be the most unfavorable one to the claimant and would be the most favorable one to the libelants, for it would put them in a position to recover as for a total loss. *Ex vi termini*, this must be greater than any partial loss that they could sustain.

This is also the position which the libelants assumed. The libels were all drawn, as has been shown hitherto (Brief, pp. 76–78), for conversion or non-delivery of the sulphur. There is no magic in the word conversion. The libelants did not have their goods, and they sued for what they claimed was their full value.

If the goods had arrived and had been delivered by mistake to the wrong consignee there can be no question but that the clause limiting the ship's liability to the invoice value would have applied. It should apply equally in a case where, from a mistaken belief as to his rights, the carrier, under such extraordinary circumstances as here existed, assumed to terminate the contract under the special clause (*b*) above referred to (*ante*, pp. 4, 51), and failed to make any delivery whatever. There was nothing willful or tortious in the carrier's action, much less was there any suggestion of fraud.

The four learned Judges who have heard the case, long after the date of the occurrences, have not

agreed among themselves as to what the master's rights and duties really were. It cannot be said, therefore, that any mere mistake the carrier may have made by reason of erroneous judgment formed by the master under the stress of circumstances with which he was confronted, was such as to vitiate the stipulation in the bill of lading limiting the ship's liability to the invoice value of the goods.

4. If the propositions can be regarded as established that the limitation of liability to the invoice value is a valid clause and that it is applicable here, the question, then, is of the interpretation of the clause in the ascertainment of damages.

In view of the stipulation of August 12 it is not necessary, perhaps, for the claimant to argue that by the contract of the bill of lading the invoice value represents the limit of damage that the owner of the goods can suffer and that it is "the basis of settlement of any loss or damage," as found by the District Judge (fol. 1177), rather than a statement which "fixes a final limit of liability beyond which he (the shipowner) shall not be required to respond," as construed by the Court of Appeals (p 349).

Inasmuch, however, as the meaning of the invoice value clause should properly be determined before the stipulation is considered and without reference to it, it is, perhaps, proper that the claimant should urge on this Court the correctness of the view of the District Judge.

a. Judge Brown's interpretation is in accord with his previous decisions in the cases of the *Hadji*, 18 Fed. R., 459; affirmed 20 Fed. R., 875, and *Pearce* v. *Quebec S. S. Co.*, 24 Fed. R., 285, and was followed in the District of New Jersey in the *Lydian Monarch*, 23 Fed. R., 298, 300.

b. The position of the Court of Appeals is apparently based on a decision of the State Court of Massachusetts, in *Brown* v. *Cunard S. S. Co.*, 147 Mass., 60, in which it was stated that, on a partial loss, the plaintiff could recover his full damages

up to the limit of the invoice value. In the Massachusetts case the attention of the Court seems to have been called to the decisions in the Federal courts, but it declined to follow them, if they could not be distinguished from that case, and decided that the plaintiff was entitled to recover damages up to but not exceeding the invoice value.

The consequence of the Massachusetts rule is that the shipper is allowed to speculate, up to the amount of the invoice value, on what the market value of the goods will be at their destination, and he may do this, not at his own risk but at the risk of the carrier. So, if by some sudden fluctuation or adventitious cause, as in this case, the market value of the goods at the place of destination should amount to almost twice the invoice value, then in case of partial loss the owner of the goods would recover his damages up to the invoice value and would also have his damaged goods.

In case of total loss he could, of course, recover no more than the invoice value which the parties have agreed will be entire compensation for the loss. This must be so for the shipper or owner of the goods cannot be regarded as having contracted for a less liability on the part of the carrier than will be sufficient to make the owner whole unless, indeed, the owner conceals the value of the goods from the carrier and no questions are asked and nothing said or agreed on as to the limit of the carrier's liability. That is not this case.

If the shipper is not satisfied with the limitation suggested by the carrier he always has the option to secure a greater recovery by paying for such security proportionally. In the present cases, if the shippers did not consider the invoice value as given a proper measure of the value of the sulphur, they might have invoiced it at a much higher figure. The liability of the carrier would have been increased to that extent.

The libelants cannot be heard now to complain that the parties, to whose rights they succeeded

and by whose contracts with the carrier they are bound, did not correctly state the value of the goods. The carrier cannot be subjected to any greater liability than he has contracted for as to the goods, because the shipper may have disposed of the goods and the contract to third parties. The bill of lading although a negotiable instrument is not of such a character as to give the vendee rights which the vendor did not have (*Pollard* v. *Vinton*, 105 U. S., 7; *The Asphodel*, 53 Fed. R., 835).

Thus the Massachusetts rule in the case of partial loss would give more than compensatory damages. There can be no better comment on this than that made by the District Judge (fol. 1177):

" A construction seems to me impossible, and, in fact, absurd that would call for the same payment on a partial loss as upon a complete destruction of the goods."

Such a construction seems still more absurd when it is considered that the payment on a partial loss might result more favorably to the owner than if there had been a total destruction of the goods, for the owner would have the invoice value if he could prove the loss, and also have the damaged goods. If the invoice value should be taken as " the basis of the settlement of any loss or damage," no such inequitable result could be reached.

If the owner shall receive the invoice value of his goods he will be compensated. Compensatory damages are the only damages he is entitled to receive. As was said by Clerke, *J.*, in *Medburg v. N. Y. & Erie R. R. Co.*, 26 Barb., 564, 567 (1858): " Compensation for actual loss sustained, is the fundamental principle upon which our law bases the allowance of damages. It will not, indeed make this allowance upon a calculation of speculative profits; for this would be proceeding upon contingencies, and would involve the subject too much in uncertainty."

This rule is general.

This exclusion of the element of profits from one scope of the contract places the rule in case of breach of contract in accord with that which is followed in cases of loss of goods where there is no contract. In such cases, the measure of the shipowner's liability *in tort* is the value of the goods at the time of shipment, or in other words, the invoice value (*Smith v. Condry*, 1 How., 29; *The Vaughan*, 14 Wall, 258; *The Scotland*, 105 U. S., 24, 25; *The City of New York*, 23 Fed. R., 616, 619).

Applying these principles to the present cases, it would mean that the recovery to which the libelants would be entitled respectively under the libels, is the invoice value of the several lots of sulphur. The shipments of sulphur were invoiced as follows: Morgan, $4,279; Parsons, $6,925; Malcolmson, $27,246; Munroe, $2,329 (fols. 383-385) If there were nothing more in the cases, the libelants on the foregoing assumptions should recover from the *Styria* these sums. There is to be considered, however, the stipulation of August 12.

5. The Stipulation of August 12.—At the time this stipulation was entered into, the sulphur was in store in Sicily. When the master discharged the sulphur, acting under the exceptions in the bill of lading (fols. 742, 756, 757) he placed it in the charge of a mercantile agent, and gave notice designating the warehouse to the shippers and to the consignees, and also to the Austrian Consul, as provided in the bills of lading.

The form of the notices which were the same in each of the cases (fol. 425) is given at folios 426-432.

The libelants and their agents in Sicily had refused to touch the sulphur. The position assumed by them was that they had delivered the sulphur to the ship, and that they required delivery by the ship to them at New York. They refused to sanction the action of the master in relanding it at Port Empedocle, and they would not exercise any control or dominion over it or retake possession of it. In effect, they

abandoned the sulphur to the ship and looked to the ship and its owners for their damages.

Expenses were accumulating, meantime, against the sulphur in Sicily, and it was for the interests of all parties that further expenses should not be incurred.

At any time prior to a decree against the ship for the invoice value of the sulphur, or certainly prior to the satisfaction of any such decree, the libelants doubtless might have had the sulphur sent forward to New York. Its market value then or the proceeds of the sale of it would necessarily reduce *pro tanto* the damages that the libelants might have sustained by the *Styria's* failure to deliver.

It would, however, be necessary to pay freight on the sulphur by whatever line it should be brought forward. The claimant, the Austro-Americana Steamship Company, was operating a line of steamships from Sicily to New York. After sulphur became free the steamship company was quite ready to carry it to New York if freight could be earned thereon.

It was therefore agreed by all parties that the cargo should be forwarded by the claimant's line on the first available steamer from that port. This proved to be the *Abbazzia*.

As the cargo had to be brought under a bill of lading, and the terms of the bills of lading originally issued by the *Styria* apparently were satisfactory to all parties it was agreed that those terms should be adopted and should form the contract under which the goods should be carried by the *Abbazzia*.

The libelants were unwilling to have such forwarding of the sulphur by the claimant act in any sense as a performance of the original contract of carriage. Accordingly, it was agreed that the cargo should be sold on its arrival and the proceeds, less charges incurred, should be credited on account of the damages, if any, that might be recovered in these cases by the libelants.

If it should be determined that the ship was justified in discharging the sulphur at Port Empedocle

under the then conditions, the libelants would not have suffered any damage that they could recover against the claimant. Whether or not the master was justified could not be told at that time. Both parties thought they were right in their contentions. If the claimant was right, the libelant would have in hand the proceeds of the sale of the sulphur, which would be lessened by expenses in Sicily if the sulphur should remain there till the decisions in these actions. Similarly, if the libelants were right, it was well, from the claimant's point of view, that the proceeds of sale should not be eaten up to large extent by storage charges.

These matters were covered by the first paragraph of the stipulation.

The second paragraph of the stipulation provided that the claimant should have a lien on the sulphur for the charges against it in Sicily which the claimant would have to pay to release it from store, if it should be determined that the master was justified in relanding the sulphur in April. If his action should not be upheld, then the sulphur would be free from any lien for such charges.

The third clause in the stipulation provided that anything done under it by either party should be without prejudice in the pending suits, except as herein provided.

This stipulation was the subject of very careful consideration by five counsel, and there can be no question that it embodies exactly the agreement the parties intended to make. It is a perfectly valid contract of carriage based on a good and valuable consideration.

There is nothing in the stipulation to indicate that it was intended to change the nature of the actions, if indeed that would have been possible, or in any way to determine or prejudice the rights of the parties. Indeed, the terms of the third clause expressly declare to the contrary.

It did not purport to, and it did not, in fact, change the situation of the parties. Its terms are

not ambiguous. They require (1) that the ship's liability, if any, and the extent of the damages sustained by the libelants in consequence should first be ascertained, and (2) that against the liability so ascertained, the consignees should credit the net amount realized on the sale of the sulphur.

Under these conditions, the sulphur was brought to New York by the *Abbazia*, which arrived on September 30, 1898 (fol. 648), and was then sold. The following tables show the invoice values of the several lots of sulphur, the proceeds of sale, the expenses thereof and the freight:

Morgan.

Invoice Value		$4,279 00
Proceeds of Sale	$4,513 46	
Weighing Charges	24 40	
		4,489 06
Freight		354 98

(fols. 1111–1112.)

Parsons.

Invoice Value		$6,925 00
Proceeds of Sale	$7,402 00	
Weighing Charges	112 88	
		7,289 12
Freight		528 00

(fol. 1116.)

Malcolmson.

Invoice Value		$27,246 00
Proceeds of Sale	$28,500 31	
Weighing Charges	116 12	
		28,284 19
Freight		2,182 50

(fol. 1123.)

Munroe.

Invoice Value		$2,329 00
Proceeds of Sale	$1,987 08	
Weighing Charges	10 00	
		1,987 08
Freight		145 00

(fols. 1128–1129).

The procedure which should have been adopted, accordingly, in assessing the damages, in view of the foregoing propositions and the terms of the stipulation, if liability had been found, would have been to decree full damages for the total failure of the ship to deliver, or, in other words, the invoice value of the shipments. Against these damages should have been credited the proceeds of the sales of the sulphur, less the charges incurred. In fact, this is what the District Court did, except that it allowed the amount of the freight to be deducted from the proceeds in determining the net amount that should be credited against the damages. In this respect it is claimed that the District Court was in error.

The stipulation specifically provided that the goods should be brought forward and delivered "upon the terms and *for the freight* specified in the original bills of lading," and that the consignees were "to pay the agreed freight on right and true delivery" (fol. 60). Then followed a semicolon, and after that a further clause that "the goods upon arrival to be sold at current market rates and the proceeds, *less charges incurred*, to be credited on account of the damages, if any, recovered in these cases by the libelants" (fol. 61).

The words "charges incurred," in that phrase plainly meant such as were incurred in connection with the sale. In other words, the net, and not the gross proceeds of sale were to be credited against the claims. The freight was to be paid before the consignees got possession of the goods, and hence before they would be in a position to make a sale. The matter of freight was to be done with before the question of a sale should arise.

The District Court said (fol. 952): "The stipulation in the bill of lading that the shipowner 'is not to be liable in any case for more than the invoiced or declared value' of the goods, does not mean that the consignees shall pay freight in addition to the loss of the invoice price;" * * *

The wording of the stipulation does not import

any such suggestion. Freight on the cargo under the original contract was never earned by the *Styria* and the consignees were never required to pay it. The stipulation did require freight to be paid by the consignees on the cargo on the *Abazzia*. If the cargo had been brought by the *Styria* originally, freight would have been due; so, if some third party had brought the sulphur forward eventually, in place of the *Abazzia*, it would have been necessary for the consignees to pay freight, but it would not have been a charge in any way connected with the sale. In effect to deduct the freight from the proceeds of sale was to allow the consignees the value of the sulphur in New York without any cost to them of bringing it there.

The suggestion that the steamship company, doing business as a common carrier, would voluntarily stipulate to carry the cargo gratuitously under any circumstances, is almost fanciful.

If the freight had not been deducted, it will be seen by reference to the tables previously given (*ante*, p. 96) that in all the cases but that of Munroe the net proceeds of sale, less the charges incurred, exceeded the invoice value, and consequently the claimant should not have been held liable for any damages, except to Munroe, in the sum of $341.92.

It is not contended that the libelants might not have secured a possible profit if the sulphur had arrived on the *Styria*, but it is strenuously maintained on the foregoing principles that the carrier should not be held liable for such a speculative loss.

The Circuit Court of Appeals adopted a view altogether at variance with the decision of the District Court and, except as to their determination in the matter of the freight, it is submitted that their errors were manifold.

6. The Court of Appeals considered the case as if the libels had been filed for a delay in delivery by the carrier, and they held that the measure of damages in consequence was the difference between the price

the goods actually brought and the price they would have brought had they been sold on the day when they should have arrived.

They declined to adopt the interpretation of the District Court of the invoice value clause. They construed it as fixing the limit of the amount the carrier could be called on to disburse.

In assessing the damages they credited the proceeds of sale less the charges incurred, which were the expenses of weighing, against the June market value of the sulphur, and they directed that a decree should be entered in the libelant's favor for the balance, less the freight which, they agreed, the libelants had to pay.

The result was to deprive the claimant of all benefit of the invoice value clause, and to put it in a worse position than if the stipulation had never been made.

Under the present decision the libelants may keep the proceeds of sale, which approximately equal the invoice value of the goods, and may also recover a loss of profit, which the Court says will exceed $20,000 (p. 364); while, if the shipowners had not brought the cargo along in the *Abbazia*, it seems clear that the libelants would have recovered no profits, but only the invoice value of their goods. The result reached by the Court of Appeals flows from an act done by a party under the stipulation, and hence violates the provision that "this stipulation and anything done by any party under it shall be deemed to be wholly without prejudice in the pending suits, except as herein provided" (fol. 791).

If the cases had continued in the condition existing on the day the stipulation was made (August 12th), decrees would have passed against the ship for non delivery merely, or for a conversion. In either case they would have been for full damages, for the amount of the invoice value of the sulphur.

If the shipowner had paid such decrees the property in the goods would have been transferred to it. The shipowner could have sold the sulphur then as

its own property, so as to provide a fund for the recoupment of its loss.

There is no doubt about this proposition as applied to payments of total losses by insurers; and the same rule has been applied to the payment of the full value of goods, or that which is agreed to be the full value, by carriers.

Subrogation is accorded to an insurance company paying a loss in full, and claiming the remnants or proceeds of the insured property (*Sun Mut. Ins. Co.* v. *Hall*, 104 Mass., 507; *Randall* v. *Cockran*, 1 Ves. Sr., 98; *Stewart* v. *Greenock Ins. Co.*, 2 H. L. C., 159; *Tunno* v. *Edwards*, 12 East., 488) or a payment, obtained by the assured, on account of the loss of the property insured (*North of Eng. Ins. Assn.* v. *Armstrong*, L. R., 5 Q. B., 244, 248, 249, 250; *Darrell* v. *Tibbetts*, 5 Q. B. D., 560), or a right of action against one by whose fault the loss occurred (*Mobile Ry. Co.* v. *Jurey*, 111 U. S., 584, 594 *St. Louis & Iron Mountain Ry.* v. *Continental Ins. Co.*, 139 U. S., 235), or a contribution in general average in respect of the insured goods (*Dickenson* v. *Jardine*, L. R., 3 C. P., 639; *The Knight of St. Michael* [1898], Prob., 30, 36; *International Nav. Co.* v. *Atlantic Mutual Ins. Co.*, 100 Fed., 304).

In such cases the underwriter, if there be no express agreement to the contrary, is entitled to all salvage (*Brooks* v. *Macdonnell*, 1 Y. & C., 500; 2 *Arnould on Insurance*, 3d Ed., p. 866; 2 *Phillips on Insurance*, §§ 1707, 1711, 1712, 1723; 4 *Joyce on Insurance*, §§ 3538, 3549, 3574, 3575).

A similar subrogation is allowed to a carrier who has paid a consignee for the loss of goods (*Hutchinson on Carriers*, 2 Ed., § 427; *The Enchantress*, 26 U. S. App., 144), or who has paid charges on the goods for which others are liable (*Streeter* v. *Chicago Ry.*, 40 Wis., 294).

In *Sun Mutual Ins. Co.* v. *Hall*, 104 Mass., 507, it was held that an insurance company which had paid a total loss on cargo, was entitled to the pro-

ceeds of sale of damaged cargo, in a port of distress, and could recover them from a creditor of the ship in whose hands they had been placed by the master.

Chapman, *C. J.* (at p. 509), said:

"The abandonment, from the time it was accepted, related back to the time of the loss, and put the insurers in place of the owners (2 *Phil. Ins.*, § 1708; *Clark* v. *Wilson*, 103 Mass., 219). The master of the vessel in the discharge of his duties to all parties interested, had purchased the draft in question with the proceeds of the cargo and sent it to the defendants, who had notice that it was the property of the plaintiffs. They ought to have sent the draft or its proceeds to the plaintiffs, whose property it was, or to * * * (the cargo owners) who would have received it for the plaintiffs. But this action should not have been brought by * * * (the cargo owners), for they had no right to the proceeds as against the plaintiffs. It is properly brought in the name of the plaintiffs, who were the owners of the draft and its proceeds."

In *North of England Ins. Association* v. *Armstrong*, L. R , 5 Q. B., 244, a policy of insurance was effected for £6,000 on the ship *Hetton*, valued at £6,000. The *Hetton* was run down and sunk by another ship. The underwriters of the *Hetton* paid her owners £6,000 as for a total loss. Afterwards £5,000 was recovered in the Court of Admiralty by the owners of the *Hetton* against the owners of the other ship.

The real value of the *Hetton* was £9,000. There was no other insurance on her; but the owner claimed to be his own insurer for the difference between the £6,000 insured under the valued policy, at that value, and £9,000, the real value; and accordingly alleged that he was entitled to one-third of the £5,000 recovered from the other vessel.

In an action by the Insurance Company against the owner of the *Hetton* to recover the whole of the £5,000 paid by the owner of the other vessel under the decree of the Court of Admiralty, it was held that as between the underwriters and the owners of

the *Hetton*, her value must be taken to be £6,000 *for all purposes*, and that, therefore, the damages recovered which were in the nature of salvage, belonged entirely to the underwriters.

Cockburn, *C. J.*, in the course of his judgment (pp. 248, 249), said:

"We are satisfied that our judgment must be in favor of the plaintiffs; and I ground my judgment upon the general proposition, that where the value of a thing insured is stated in the policy in a manner to be conclusive between the two parties, the insurer and the insured, as regards the value, then, in respect of all rights and obligations which arise upon the policy of insurance, the parties are estopped between one another from disputing the value of the thing as stated in the policy.

"Now, I take it to be clearly established, in the case of a total loss, that whatever remains of the vessel in the shape of salvage, or whatever rights accrue to the owner of the thing insured and lost, they pass to the underwriter the moment he is called upon to satisfy the exigency of the policy, and he does satisfy it. It is admitted that if this ship had been recovered from the bottom of the sea by any of the contrivances of modern skill and science available for that purpose, the body of the vessel would have passed to the underwriters. If, moreover, her value had proved to be more than the estimated value in the policy, the underwriters would still have been entitled to the vessel so recovered. And I think it is clear also, where we have, instead of the ship, the supposed value of the ship, or so much of it as the delinquent vessel could be called upon to contribute for that loss, that what is recovered must be taken to represent the lost ship; and then, just as the underwriters would be entitled to the ship if it could have been bodily got back, so they are entitled to that which is the representative of the ship in the shape of damages to be paid by the owners of the vessel which caused the collision. * * * It has always been considered as a settled rule in insurance law, as I started with observing, that where there is a total loss the underwriters, who pay upon a total loss, whether it is actual or whether it is constructive, are entitled to anything that remains of the

vessel and to anything which would otherwise have accrued to the owner of the vessel by reason of his ownership. Where the policy is an open policy, and simply a policy of indemnity as to the actual value of the vessel, no difficulty would arise in such a case as this. It is only because it is a valued policy that these difficulties present themselves. I think we must still apply the old rules and not make new; and *if a party chooses to have his vessel or his goods, as the case may be, taken at a fixed value instead of leaving the contract, as in an ordinary policy, simply one of indemnity to the extent of the real value, and if thereby any benefit accrues to the underwriters, the underwriters must be entitled to it.*"

Lush, *J.* in the same case (at p. 250), also said:

"I am of the same opinion. A person effecting an insurance may either agree upon the amount which is to be considered as the sum forming a complete indemnity, or he may leave it open. If he fixes the amount which he is to be paid in the case of a total loss, and the underwriter accepts that amount, then that amount must be binding upon both parties. If each of the parties agree that a certain sum shall be deemed to be the value of the thing insured, the underwriter, in the case of a total loss, is not to be at liberty to say the thing is not worth so much; he is bound to pay the amount fixed upon, whether it is the proper amount or not. And, on the other hand, the assured is not at liberty to say it is worth more; he is bound by that amount. It is for the purpose of avoiding all question about the value that the parties agree to fix that amount, and for all purposes, therefore, of adjusting the rights under that policy both the parties are bound by that value."

In *Mobile, &c. R. Co.* v. *Jurey* (111 U. S., 584, 594), the Court said:

"The payment of a total loss by the insurer works an equitable assignment to him of the property and all the remedies which the insured had against the carrier for the recovery of its value (*Mason* v. *Sainsbury*, 3 Doug., 61; *Yates* v. *Whyte*, 4 Bing. (N. C.), 272; *Clark* v. *Hundred of Blything*, 2 Barn. & C.,

254; *Ins. Co.* v. *Tyler*, 16 Wend., 385; *Ins. Co.* v. *Storrow*, 5 Paige, 285). * * *

"Insurers of a ship which has been run down and sunk by the fault of another ship are, upon their payment of a total loss, subrogated to the right of the insured to recover therefor against the owners of the latter vessel, and if their policy was a *valued* one, their payment of this value will give them the whole *spes recuperandi*, and the right to the whole damages, though the insured vessel was, in fact, worth a larger sum than the valuation named in the policy (*Ins. Asso.* v. *Armstrong*, L. R., 5 Q. B., 244; see also *Clark* v. *Wilson*, 103 Mass., 227)."

Payment by the carrier of a loss in an amount agreed to represent the full value of goods, transfers the property in the goods to the carrier (*Hagerstown Bank* v. *Adams Express Company*, 45 Pa. Stat., 419).

In this case, the Adams Express Company sued the Hagerstown Bank to recover $3,315 of the notes of the bank, which the plaintiff averred were the property of the express company, by reason of its having paid a claim for the loss of the notes while in its custody, and which, it was afterwards discovered, had been canceled or destroyed, whereby the bank was relieved from all liability to redeem them. It appeared that a package containing $9,455 of the notes of the Hagerstown Bank was made up by the Merchants' Bank of Baltimore, and received by the Adams Express Company to be delivered to the Hagerstown Bank. On delivery of the package, it was found that $3,360 had been abstracted, and a bundle of newspapers cut to the proper size had been substituted. The express company was informed of the loss, and its superintendent, Mr. Bingham, gave his check to the cashier of the bank for the amount of the loss, obtaining at the same time the cashier's receipt therefor. The money had been stolen by an express messenger who subsequently burned notes of the value of $3,315 apparently to avoid detection. Burned fragments of the notes were found, and the jury determined as a fact that

the express messenger who stole the notes actually destroyed them to the amount stated.

The action of the express company against the bank was based on the theory that the property in the notes passed to the express company on payment of the loss; that if the notes had been recovered, the bank would have been bound to redeem them; that the destruction of the notes merely destroyed the evidence of the bank's debt, but not the debt itself; and that the bank was liable for the amount of its destroyed notes. From a verdict and judgment in favor of the plaintiffs, the defendant sued out its writ of error.

Woodward, *J.*, who delivered the opinion of the Court, said:

"The express company had undertaken to carry $9,455 of money from Baltimore to the Hagerstown Bank. It was the bank's property, and the carrier was bound by law to deliver it to them. An agent or clerk of the express company stole $3,360 from the package during its passage. It was the duty of the company to make good the sum to the bank. The bank could have recovered against them at law. When Colonel Bingham, therefore, on the 11th of October, paid to the bank $3,360 in settlement of the claim, he did only what the law would have compelled his company to do, and the bank received only what they are entitled in equity and good conscience to receive and retain. * * *

"But *the consequence of such settlement and payment was to transfer the property in the notes from the bank to the express company.* The bank having received the value of the notes had no further right to the notes themselves, and were bound to redeem them when presented, as they would redeem any other paper issued by them. Simmons, the company's agent, had the custody of the notes, but he had acquired no property in them, for he had taken them from his employers feloniously. He was bound in law and conscience to return them to his employers, in whom the title had now vested absolutely; and whilst he retained the custody, he must be considered as holding in trust for them. Whatever of the notes he passed away was the company's

loss, and whatever he destroyed inured to their benefit, for it entitled them to claim so much money from the bank as for destroyed notes of their issue."

Recovery on the theory of a conversion would lead to the same result. The libelants' right to recover the value of the goods which they failed to receive cannot be varied by the form of the action they choose to bring. For all purposes they have agreed with the carrier that as between them the value of the goods is the invoice value.

The measure of damages in conversion would be the value of the property at the time of the conversion (*Smith* v. *Forster*, 15 Vermont, 182; *Falk* v. *Fletcher*, 18 C. B., N. S. 405 (sailing away with cargo against the consent of the owner); *Forbes* v. *Boston Railway*, 133 Mass., 154 (delivery to wrong person); *Henshaw* v. *Bank*, 10 Gray, 568).

If it should be determined that there was a conversion at the port of loading and that the damages were the market value of the goods, these, doubtless, could not be greater than the invoice value, because it was at the port of loading that the goods were invoiced. If it should be determined that there was a conversion at the place where the goods should have been delivered, and that the market value of the goods there should be the measure of the damages the result would be the same, for, while a carrier may be held liable in trover for loss or wrong delivery or non-delivery of goods entrusted to him for carriage (*Bullard* v. *Young*, 3 Stew. (Ala.), 46), yet it is open to him to show that he had the goods in his possession under a contract limiting his responsibility, and the damages would not be different on the same state of facts whether the plaintiff sued in contract or in tort (*Hobbs* v. *London Railway*, L. R. 10, Q. B. 111; *Francis* v. *St. Louis*, 5 Mo. App., 7).

On the satisfaction of such decrees the claimant would have acquired title to the sulphur, under the rule that payment of a judgment recovered by the

plaintiff in trover for the value of the goods, or the amount which the jury awards for the value, operates to divest him of his property in the chattels converted, and to transfer his title to the defendant (*Campbell* v. *Phelps*, 1 Pick, 61; *Brinsmead* v. *Harrison*, L. R., 6 C. P., 584; *Elliott* v. *Hayden*, 104 Mass., 180; *Marsden* v. *Cornell*, 62 N. Y., 215; *Thayer* v. *Manley*, 73 N. Y , 305; *Baltimore Marine Ins. Co.* v. *Dalrymple*, 25 Md., 307; *Lovejoy* v. *Murray*, 3 Wall., 1; *Cooper* v. *Shepard*, 3 C. B., 266).

7. The terms of the stipulation itself show conclusively that the parties did not regard the actions as for delay in delivery, nor that the rights of the parties as they existed on August 12 were in any way changed by the stipulation.

In the first clause of the stipulation it was provided, "the goods upon arrival to be sold at current market rates." This was altogether inconsistent with the view that the goods were being forwarded to the consignee for his account under the original contract. In that event there could have been no provision for sale or disposition of the proceeds. The value of the sulphur received under those circumstances, would be applied as matter of law against the damages alleged to have been sustained by the libelants because of non-delivery.

Moreover, in the second clause, it is provided that the claimant shall have a lien on the sulphur for those charges the libelants would have had to pay "if they undertook to forward the cargo on their own account."

The third clause of the stipulation declared that anything done under it should "be deemed to be without prejudice in the pending suits." It seems difficult to imagine a clause which could provide more specifically that the stipulation should be without prejudice.

Yet the Court of Appeals looked at an act done under it (the forwarding of the cargo by the *Abbazia*) as one of the material facts on which it rested the finding that the measure of damages was the differ-

ence between the price the sulphur would have brought if sold *ex Styria* in June, and what it brought when sold *ex Abbazia* in October.

This is in direct violation of the terms and spirit of the stipulation.

It is plain that this measure of damages could not have been adopted if the carrier had not sent the goods forward as he did under the stipulation. In view of the reservation in the third clause, the Court was bound to disregard all acts done under the stipulation until after it had determined all questions in the suits on the facts as they were before the stipulation was entered into. In other words, the Court should have closed its eyes altogether to the fact that the cargo had been forwarded, *pendente lite*, and should have determined the cases on the issues as they stood before or on August 12th. The sole intended effect of the stipulation was to provide that after the cases had been decided without regard to what was done under it, a credit of the amount of the proceeds of the sale of the cargo should be set over against any damages that the libelants should be adjudged entitled to recover on the causes of action for non-delivery as defined in the pleadings.

The objects and provisions of the stipulation were disregarded or lost sight of in the first opinion; and in the second opinion, after the reargument, the Court bluntly refused to give effect to it, for reasons which are far from being satisfactory.

The Court states that it can make no difference how the sulphur was brought forward, if the claimant had failed to bring the cargo forward the owner could have withdrawn it from the Sicilian warehouse, paying the *Styria's* lien for expenses and freight, and could have brought it forward himself or sold it in Sicily (p. 363). No doubt he might have adopted either of those courses at any time prior to the payment by the ship of final decrees for the adjudged value of the sulphur; but if he had done so, the measure of damages would have been, not for

delay in delivery, because the forwarding of the goods by the goods owner would not have constituted delivery by the ship in any sense, but such as the Court would have awarded for non-delivery, less what the goods owner had realized by bringing the goods forward himself, and in determining the measure of the ship's liability the invoice clause would have been applied.

8. The Court of Appeals adopted a wrong principle, even on its own reasoning, in treating the case of non-delivery followed by the forwarding of the goods in another vessel, like a delay in carrying the cargo to destination in the original vessel, and in determining that the measure of damages in a case of transshipment is the same as in cases of delayed delivery by the same vessel.

In the case of *Smith* v. *Tregarthen*, 56 L. J., Q. B., 437; 6 Asp. Mar. Cas., 137, the defendant, the master of the steamer *Carbis Bay*, lying at Wilmington, signed bills of lading for 400 bales of cotton, "shipped on board" his vessel for Liverpool. In consequence of insufficient room only 165 bales could be shipped and the defendant directed that the 235 remaining bales be shipped by the *Wylo*, lying in the same port, and also bound for Liverpool. The *Carbis Bay* reached Liverpool on the 26th of October, and the *Wylo* on the 29th of October, and the whole 400 bales were delivered to and accepted by the plaintiffs who were indorsees of the bills of lading. Between the 26th and the 29th of October, the price of cotton fell, and the plaintiffs sued the defendant to recover the loss thus occasioned. Damages for loss of market by delay in delivery whether in an action of contract or of tort are not recoverable in England against carriers by sea on the ground that such damages are too remote (*The Parana*, 2 P. D., 118; 3 Asp., 399; *The Notting Hill*, 9 P. D., 105; 5 Asp., 241). It was held by Day and Wills, *JJ.*, that on the 26th of October the plaintiffs had a right of action for non-delivery; that the measure

of damages was the market value of cotton on that day, and that the subsequent delivery by the *Wylo* could only be taken into account in reduction of damages.

Wills, *J.*, said: * * * "On the arrival of that ship [*Carbis Bay*] she is found not to have the goods on board, and at that moment a right of action for non-delivery of the goods enures to the holders of the bills of lading. What takes place afterwards between the plaintiffs and defendants might have taken place in accord and satisfaction of the original cause of action, but there must have been an agreement to that effect. The delivery, ex the *Mylo*, is not delivery ex the *Carbis Bay*, and the only result of the subsequent transactions between the parties is the reduction of damages."

The only difference between that case and these cases is that here the measure of damages for non-delivery *ex Styria* was the *invoice* value, instead of the market value. The Court of Appeals should have followed the rule of the English case, and should have held that the subsequent delivery by the *Abbazia*, October 6th, could only be taken into account in reduction of the damages which accrued June 3d for non-delivery *ex Styria*, as limited by the invoice value. That was the rule adopted by the District Judge. The proceeds of sale of the cargo *ex Abbazia* about equalled, if they did not exceed the invoice value (fols. 1044, 1052, 1064–1065, 1111).

If the proceeds equalled only the invoice value the libelants at most should have decrees for interest on the capital involved, that is, the invoice value. If the proceeds exceeded the invoice value the libels should have been dismissed.

Nothing that the libelants could have done on their own initiative would have put them in a position to recover the amount of damages the Court of Appeals has awarded in consequence of the act of the shipowner in sending the goods forward by an-

other vessel, under the conditions and limitations of the stipulation of August 12th.

It is surely a novel proposition to the law that an injured party, by acts of his own subsequent to the injury may increase the amount the wrong-doer shall be bound to pay as compensation for his wrongful act.

This fact clearly shows that the Court has put a construction on the stipulation of August 12th, which prejudices the rights of the claimant, and hence is contrary to the provisions of the stipulation itself.

In treating the actions as for delay in delivery instead of for failure of delivery, the Court of Appeals said (p. 348): "There was no loss or deterioration of the sulphur, but there was a loss of market. * * * The measure of damages in such cases is well settled; the loss is the difference between the price the goods actually brought and the price they would have brought had they been sold on the day when they should have arrived. The only remaining question in the case is whether this method of calculation is modified by the expressed terms of the contract."

The only theory on which loss of market would be recoverable by the libelants would be that of delay in delivery of the goods. The cases here could not be regarded as for delay in delivery unless it should be considered that the sulphur was brought forward finally by the claimant pursuant to the original contract and bill of lading. In other words, it must be contended that there was an accord and satisfaction between the parties as to the libelants' right of action for non-delivery. This was not the fact.

If by any chance the Court should determine that the actions here were for delay in delivery, and that damages were sustained by the libelants by reason of the delay, it should be borne in mind that it was entirely within the power of the libelants to obviate the delay and consequently the damage.

The libelants knew that the master of the *Styria*

refused to carry the sulphur because of facts of war and in fact had sailed without it. They have consistently claimed that the sulphur was theirs all the time it was in Sicily, and that they might have disposed of it there as might have seemed to them most advisable. They have contended that sulphur might have been carried freely and safely from Sicily to New York at all times. They likewise contend that they were suffering great loss of market because they did not have the sulphur in New York. If their contention as to the safety of the passage of sulphur is correct, it is clear that they might have arranged for its quick transference from Sicily to New York and so cut off materially, if not entirely, the damage due to delay and a falling market.

It is an elementary principle of the law of damages that the injured person must not do anything to increase the damages sustained by him by reason of the wrongful act of another. He does in fact increase such damages if they become enhanced because of some neglect of his own, for his own act or default thus becomes the *causa causans* of the damage.

The rule is stated even more strongly in *Hamilton* v. *McPherson* (1863), 28 N. Y., 72. In that case the defendants had contracted to transport a quantity of oats from Perth in Canada to Oswego. They negligently failed to send a vessel to Perth to take the oats with reasonable diligence. The oats became heated and damaged by reason of the hot weather during the delay at Perth.

Selden, *J.*, said at page 76:

"The delay, if proper care had been bestowed upon the oats, would not have resulted in their injury. The direct cause of injury, therefore, was the want of care. The necessity for extra care arose from the delay, and the expenses attending such necessary care, if it had been bestowed, would have been the direct result of the defendants' breach of contract. For such expenses they would have been answerable, but were not answerable for

the damage which *resulted from the failure to bestow that care.* The law, for wise reasons, imposes upon a party subjected to injury from a breach of contract the active duty of making reasonable exertions to render the injury as light as possible. Public interest and sound morality accord with the law in demanding this; and if the injured party, through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls upon him" (*Miller* v. *Mariners' Church*, 7 Greenleaf, 51; *Shannon* v. *Comstock*, 21 Wend., 461; *Heckscher* v. *McCrea*, 24 *Id.*, 306; *Clark* v. *Marsiglia*, 1 Denio, 317; *Spencer* v. *Halstead*, *Id.* 606; *Loker* v. *Damon*, 17 Pick., 284).

See also

Cook v. *Soule*, 56 New York, 420, 433.
Hitchcock v. *Hunt*, 23 Conn., 343.

Therefore, in this instance also the libelants should not be allowed to recover from the claimant for the consequences of a wrongful act which was in fact their own.

9. It is impossible to state what contentions will be made in this Court by the libelants, in view of the decision of the Circuit Court of Appeals, but it is altogether clear from the original briefs filed by the libelants in the Court of Appeals that their counsel did not regard the cases in any other light than for non-delivery.

In the separate brief of Morgan, filed by Mr. Burlingham, the following passages occur:

"The suits against the *Styria* are not brought to recover for *damage* to goods nor for *detention* of goods. They are brought for the *refusal of the shipowners to deliver* the goods at all (p. 5). * * *

"The stipulation of August 12, 1898, does not modify the ship's liability.

"This is conceded by the counsel for the *Styria* (Brief, p. 39).

"The provision that the goods landed *ex Styria* at Porto Empedocle should be forwarded 'upon the terms and for the freight specified in the original bills of lading,' was made for convenience merely.

It was, of course, proper that some bill of lading should be issued and some freight fixed, and the original bill of lading was as good as any other for that purpose. The forwarding, however, was in no sense for the account of the libelants, as appears clearly in the second paragraph of the stipulation, which provides that the claimant shall have a lien upon the cargo for the charges and expenses against the same 'which the libelants would have had to pay * * * *if they undertook to forward the cargo for their own account*' (fol. 63).

"It was clearly to the advantage of the ship to have the goods sent forward to New York, where they could be sold; for if the shipowners were held responsible for an unlawful landing of the goods they would have to pay libelants' claim to the extent of the value of the vessel, *and besides would have on their hands a quantity of brimstone, for which there was probably no market in Sicily.* In these circumstances they entered into negotiations with the libelants, and the result was the stipulation of August 12th" (pp. 8, 9).

While in the brief filed by counsel for the libelants, Morgan, Malcolmson & Munroe, damages based on the market value of the sulphur in June are asked for, yet it is conceded that the case is one of non-delivery, for the passage occurs (p. 28) "the damages to the libelants *from the failure to bring this cargo by the Styria* should be estimated in the ordinary way."

The brief filed for the libelant Parsons was drawn on the theory of a conversion by the claimant. In his original brief, after referring to the demand on the master for the sulphur on the arrival of the *Styria* and the non-delivery, he says (p. 18): "He (the master) is thus *prima facie* liable for a conversion of the libelants' brimstone, or he is liable for a breach of contract to carry and deliver it." In a case of conversion or of breach of contract to carry and deliver there can be no question of delay in delivery.

In that brief it is admitted (p. 20) that "the invoice value would see" the shippers of the sulphur

whole, but it was contended that the purchasers of the bills of lading in some way had greater rights than the shippers.

The pleadings, the stipulation and the contentions of the respective counsel show that it was not understood by the parties that the rule for measuring the damages was changed, or affected, by the stipulation of August 12, 1898, or by the forwarding of the cargo under it, and its conversion into cash; except that such cash was to be credited to the ship if damages were adjudged against her. All the counsel are agreed; (1) that the actions are for non-delivery; (2) that against the damages, as determined by the Court, the ship is to have a credit of the net proceeds of sale, and (3) that the damages for non-delivery are limited to the invoice value in the first instance, and before the credit is given, unless something in the quality of the master's act makes the clause inapplicable, or unless it is inapplicable, by reason of its terms, to this kind of a case.

The only real difference between the parties was as to the office of the clause limiting the ship's liability to the invoice value as applied to the circumstances of these cases.

The Court also say that when the stipulation was signed "no answers had yet been interposed nor claims made that the damages must be scaled down to the invoice value."

It is true that the answers had not yet been put in, but that fact can have no bearing properly on these cases. In each one of the libels the bill of lading had been set up or referred to as the basis of the contract of carriage (*ante*, *pp.* 96–98). The testimony of the master had been taken, and the bills of lading had been produced by the libelants in evidence (fols. 400, 404) on June 8 (fol. 386). There can be no question therefore but that the libelants were fully informed long before the stipulation was made of the clause in the bill of lading limiting the ship's liability to the invoice value.

The claim of the limitation of the ship's liability

was duly made in the claimant's pleading. It is not altogether clear to the claimant how its contention could have been put on the record, prior to the filing of the answer.

10. The Court says further, that the language of the stipulation does not import such a one-sided agreement as would result from a construction of it which would require the damages to be assessed in accordance with its terms, "so that although, concededly, they [libelants] have lost over $20,000, through the ship's misconduct, they cannot recover anything, while by the same stipulation the ship gives up nothing" (p. 364).

As a matter of fact, in the result, the ship "gave up" more than $5,000, under the stipulation of August 12th, in paying charges on the sulphur and the cost of reloading it and forwarding it, which was disallowed to her in the District Court.

All that either party "gave up" on the signing of the stipulation was a contingent loss according to the market value of the sulphur when it should arrive. If that value should be more than the invoice value the libelants would gain and the claimant would suffer no loss, because the libelants would have suffered no loss. If it should be less than the invoice value the claimant would have to make up the difference.

It is not conceded that the libelants "have lost over $20,000 through the ship's misconduct." At most they have lost a speculative profit. Under the terms of the contract of carriage it would be most inequitable t allow them to recover any such loss from the claimant.

It is not necessary for the claimant to contend that it is entitled to any excess of the proceeds of the sale of the sulphur above its invoice value. It should be sufficient for the libelants that it does not make any claim to such excess here.

The libelants contended in the court below that the suggestion of such a claim would be monstrous,

and would be a *reductio ad adsurdum* of the theory advanced by the claimant as the proper one for the disposition of these cases. The claimant by no means admits this. On the contrary, it might well result that under certain circumstances where the carrier has paid for the loss of an article that it failed negligently to deliver, and the article should be recovered subsequently, its value might have appreciated, and the carrier might secure from its sale more than had been paid for its loss. This result is not altogether unusual in insurance cases where the insurer has paid for a total loss and taken the thing itself. It would seem that the case of a carrier should rest on the same basis. No decision has been found that the carrier in such case would be liable to the original owner in any form of action for the excess. It does not seem a necessary determination by the Court here in the decision of these cases.

If there should be any such excess here it would mean that the libelants had not suffered any damages, for it is an unquestioned principle that if the consignee or owner of the goods has in fact received them, their value will reduce *pro tanto* his damages. The damages here were the amount of the invoice value, and if the proceeds of sale should be credited against these damages, there would not be any deficit to be made good by the carrier. This is the procedure contemplated by the stipulation, and it is the result that would have been obtained if the consignee had received the goods, though there had been no stipulation.

The claimant does not say that the sulphur would not ever be worth, at any place, more than the invoice value, but it does say that the consignees under the bills of lading here cannot claim more than the invoice value simply because its price has fluctuated and they have lost a possible profit.

The consignees would not have any reason to complain if the sulphur had not been brought forward, but if the claimant had paid decrees here for the invoice or full value of the cargo, and then either had

sold it in Sicily, or had brought it here on their own account, as it had the right to do, and then sold it for a sum largely in excess of the invoice value. The consignees and libelants had their election, but they could not both recover the value of the sulphur and also retain the sulphur or its equivalent.

In effect they are trying to do that here, and the decision of the Court of Appeals would seem to sanction the attempt.

It is submitted that even if the master committed an error in relanding and storing the sulphur, none of the libelants, save only the libelant Munroe, has sustained any damage that he is entitled to recover against the shipowner.

Last Point.

The decrees appealed from should be reversed, with costs, and the causes remanded with instructions to enter decrees in the principal cases dismissing the libels, with costs, and to enter decrees in the cross-actions for freight in favor of the libelants, with costs.

Dated New York, November 20, 1901.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Petitioner.

J. PARKER KIRLIN,
CHARLES R. HICKOX,
Of Counsel.

No. 672 and 673.

12908

EVENING POST JOB PRINTING HOUSE, NEW YORK.

By. of Burlingham & Ivey for Respondents

Office Sup
MAY
JAMES H. McKENNEY, Clerk.

Filed May 28, 1900.

Supreme Court of the United States.

The Steamship "STYRIA," Antonio G. Scopinich,
Claimant-Appellant-Petitioner,

against

JAMES L. MORGAN *et al.*,
Libellants-Appellants.

672.

THE SAME,
Petitioner,

against

JOHN MUNROE *et al.*,
Libellants-Appellants.

674.

BRIEF FOR LIBELLANTS IN OPPOSITION TO PETITION OF "STYRIA" FOR CERTIORARI.

The principal question raised on this application is as to the amount of damages The original libels were filed against the *Styria* for failure to deliver to the libellants in New York a quantity of sulphur shipped in Sicily in April, 1898. War having been declared between Spain and the United States and sulphur being included in articles of contraband, the master discharged the sulphur at the port of shipment, and on May 8th sailed for New York, leaving the sulphur in store in Sicily.

Two days before the *Styria* sailed, as the result of negotiations between the Italian and Spanish Governments, it was officially announced that sulphur would be treated as free from capture.

Both the lower Courts held that the master was not justified in leaving the sulphur in Sicily, the learned District Judge, the Honorable Addison Brown, holding that the "commencement of the discharge on the 27th (April) was too hasty and precipitate" (Record, fol. 945), and the Court of Appeals holding that, although the master did right in discharging the cargo, it was his duty to reload it on learning that it was to be treated as free. The District Court gave decrees against the *Styria* in favor of the libellants for their damages and dismissed the cross-libels brought by the owner of the steamer for the expense of discharging and storing the sulphur. The Circuit Court of Appeals also decreed for the libellants, but allowed the ship to recover the proper expenses of discharging and reshipping at Port Empedocle.

While the lower courts found the ship liable for failure to bring the cargo forward, they differed on the question of damages. The original libels were filed in June, 1898. On August 12, 1898, the parties by their proctors entered into a stipulation under which the goods were brought forward to New York by another steamer "without prejudice to the pending suits," delivered to the libellants in New York, and sold at current market rates, the proceeds to be credited on the damages, if any, and the ship to have a lien on the goods for the expense of discharging, storing and reloading in Sicily.

I.—THE PETITIONER IS NOT AGGRIEVED BY THE RULINGS OF THE CIRCUIT COURT OF APPEALS ON THE EXCEPTIONS OF THE BILL OF LADING.

The exceptions relied on by the petitioner are—

(*a.*) "Restraints of princes."

(*b.*) The clause giving the master the right to land and store the goods at the risk and expense of the shippers in

case of blockade of the port of *discharge*, or if he shall "consider it unsafe for any reason to enter or discharge cargo *there*."

(*c*.) The clause giving the master the right to transship.

(*a*.) The Circuit Court of Appeals sustained the contention of the petitioner as to this clause, saying:

"We find in clause (*a*) abundant authority for a refusal to carry forward the sulphur while such a condition of affairs existed as that already described as being generally known to exist when the discharge began on April 27th" (Record, p. 342).

(*b*.) The clause giving the master the option of landing the goods in case of blockade or interdict of the port of *discharge*, of course, has no application to the circumstances of this case. The District Court so held, and the Circuit Court of Appeals stated that they did not find it necessary to discuss this branch of the case for the reason that they thought the master had the right to discharge the sulphur under the exception of "restraints of princes."

(*c*.) The clause giving the master the right to transship has never been under discussion and calls for no judicial interpretation in this Court.

Although the circumstances of these cases, connected as they are with the recent war, are not without a certain interest, no legal question of importance is involved in them. On the merits the main difference betwen the District Court and the Circuit Court of Appeals was as to whether the shipowner was entitled to recover the expenses of discharging and reloading the sulphur, and the decision of the Appellate Court on this point was in favor of the petitioner.

II.—THE PRINCIPAL QUESTION IN THE CASES IS ONE OF DAMAGES.

The Circuit Court of Appeals said:

"The measure of damages in such cases is well settled; the loss is the difference between the price the goods ac-

tually brought and the price they would have brought had they been sold on the day when they should have arrived. The only remaining question in the case is whether this method of calculation is modified by the express terms of the contract."

Record, p. 349.

The clause of the bill of lading referred to provides that the shipowner shall not be liable "in any case for more than the invoice or declared value of the goods whichever shall be the least."

The District Court erroneously held that this clause made the invoice value "the basis of settlement of any loss or damage" (Record, fol. 1177).

The Circuit Court of Appeals held that the clause merely "fixes a final limit of liability beyond which he (the shipowner) shall not be required to respond; it does not profess to regulate the calculation by which a loss is to be ascertained, if such loss is less than the limit."

We submit that the Circuit Court of Appeals was correct in its interpretation of the invoice value clause and gave full effect to the clause. To give the words such a meaning as was given to them by the District Court "would seem to be to substitute for the contract the parties have made another and different one, which they might easily have made for themselves, had they wished to do so" (Opinion of Circuit Court of Appeals, p. 350).

As to the stipulation, the petitioner has already had a full reargument before the Circuit Court of Appeals on the meaning of this agreement entered into between the respective proctors. It is not a matter worthy of the consideration of this tribunal. The brief opinion of the Circuit Court of Appeals on the reargument shows clearly the absurdity of the claimant's interpretation of the stipulation.

Record, pp. 363-4.

We respectfully submit that these cases are not of sufficient importance to justify the issuance of the writ of *certiorari*, which will necessarily delay the final determination of these causes for another year.

As was said in the case of Forsyth v. Hammond (166 U. S., 506):

"While this power (in *certiorari*) is co-extensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

CHARLES C. BURLINGHAM,
Advocate for Morgan.

MELVILLE H. REGENSBURGER,
Advocate for Munroe.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

The Steamship "STYRIA,"
ANTONIO G. SCOPINICH, Master,
Claimant-Appellant-Petitioner,

AGAINST

JAMES L. MORGAN, and others,
Libellants-Appellants.

AUSTRO-AMERICANA STEAMSHIP COMPANY,
Libellant.

AGAINST

3250 cantars of brimstone *ex* Steamship "ABBAZIA,"
JAMES L. MORGAN and others,
Claimants-Petitioners.

No. 72.

On writs of *certiorari* from the Circuit Court of Appeals for the Second Circuit.

BRIEF FOR MORGAN.

The first suit above is one of four brought by the owners of brimstone shipped on board the steamship *Styria* at Porto Empedocle, Sicily, in April, 1898, for failure to transport the brimstone to the port of New York, and there deliver it in accordance with the terms of the bills of lading. Subsequently, by stipulation between the parties, the brimstone was brought over by the *Abbazia*, another steamer belonging to the Austro-Americana Steamship Company, which is the owner of the *Styria*, and upon its arrival in New York it was proceeded against upon four libels by that Company, of which the second suit above is one, for expenses incurred in landing and storing in Sicily.

The *Styria*, which is an Austrian vessel, arrived at Porto Empedocle (Girgenti), on April 21st, 1898, on a voyage from Trieste to New York via Sicilian ports. She began taking in a cargo of brimstone on the 21st, which day, according to the President's proclamation, marked the beginning of a state of

war between the United States and Spain (The *Pedro*, 175 U. S., 354). She finished loading brimstone on April 25th (fol. 396), and cleared at the Custom House on that day, or the 24th (fol. 409). Bills of lading were issued, containing, among other exceptions, the following:

(*a*) "Restraints of Princes and Rulers of People."

Fol. 742.

(*b*) "In case of blockade or interdict of the port of discharge, or if without such blockade or interdict, the master shall consider it unsafe, for any reason, to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense; and on the goods being placed in charge of any mercantile agent or of British consul, and a letter being put into the Post Office, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the master and owners discharged from all responsibility."

Fols. 756-7.

(*c*) "With liberty (in event of steamer putting back to this or into any other port or otherwise being prevented from any acts from commencing or proceeding in the ordinary course of her voyage) to ship or tranship the goods by any other steamer."

Fols. 743-4.

(*e*) "With liberty either before or after proceeding towards the port of discharge to proceed to and stay at any port or ports whatsoever."

Fol. 760.
See also Opinion of District Court, fols. 934-6.

On April 25th, the Queen Regent of Spain issued a proclamation of war, in which sulphur was declared contraband of war. The same day the master of the *Styria* received a telegram from Burrill and Sons of London, managing agents of the owners of the *Styria*, directing him "to discharge whole cargo as quickly as possible" (fols. 456-7). On April 27th the master began to discharge and warehouse the brimstone, notifying the shippers that he did so "on finding risky my

passage to New York, with the actual sulphur cargo, for facts of war" (fols. 426-7 & 437). The shippers protested (fol. 446); but the master continued the discharge, which was completed on May 7th (fol. 439), when the ship cleared and proceeded the next morning (fol. 447) to Messina and Palermo, at which ports she took on a cargo of fruit and sailed from Italian waters May 9th for New York, where she arrived June 3d (fol. 448).

Almost immediately after the proclamation of the Queen Regent, negotiations were opened by the Italian Government to secure a modification of its provisions, so that sulphur should not be regarded as contraband of war. These negotiations were reported daily in the Giornale di Sicilia, a newspaper published at Palermo, and were read by the captain of the *Styria*.

> See extracts from Giornale di Sicilia, dated April 24-5, 26-7, 27-8, 29-30, May 1-2, 3-4, 5-6 and 7-8, Record, pp. 214-7.
>
> Also stipulation, which contains admission that these issues of the newspaper "were read by the captain of the *Styria*," Record, fols. 801-2.

Also stipulation, which contains admission that these issues of the newspaper "were read by the captain of the *Styria*."
Record, fols. 801-2.

The negotiations were successful, and in the issue of May 5-6 there was published an official declaration from the Italian Minister of Agriculture, Industry and Commerce, "that the Spanish Government has given notice to the commanders of its vessels to let sulphur pass free" (fols. 862-4).

Both the District Court and the Circuit Court of Appeals decided the cases on the merits in favor of the merchants and against the ship.

The opinion of the District Court will be found at pages 232-9 of the Record.

The opinion of the Circuit Court of Appeals will be found at pages 338-350 of the Record.

The learned District Judge held that the "commencement

of the discharge on the 27th (April) was too hasty and precipitate" (Record, fol. 945).

He found "that the ship was not justified * * * in discharging and storing the cargo on account of the shippers, as she did, between April 27th and May 7th; that by the 10th of May there was reasonable assurance that it would be safe to go on with the voyage, and that this was not an unreasonable time for the ship to wait under the facts and circumstances currently known in Sicily at that time" (fol. 947).

The District Court therefore dismissed the libels of the Steamship Company for charges and expenses.

On the question of damages the District Judge interpreted the clause of the bill of lading which limited recovery to the invoice value of the goods, to mean that the invoice value was "the basis of settlement of any loss or damage" (fol. 1177). Accordingly, he held that the libellants could recover only the difference between the invoice value of the brimstone and the proceeds of its sale, which, in the case of Morgan, amounted to $144.92 (Commissioner's Report, pp. 274-8). The damages claimed by Morgan amounted to $3,410.92 (Report, fols. 1039-1040, 992, 999 and 1012), which is the difference between the value of the brimstone in New York on June 3d, 1898, when the *Styria* arrived, and the proceeds of the brimstone when sold in October *ex* steamship *Abbazia*.

Both sides appealed to the Circuit Court of Appeals, the shipowner on the merits, the merchants on the damages. The Circuit Court of Appeals modified the decision on the merits, holding that the master did right in discharging the cargo, but that it was his duty to re-load on learning that it was to be treated as free. Accordingly, the Appellate Court allowed the ship to recover the proper expenses of discharging and reloading at Porto Empedocle.

The Circuit Court of Appeals reversed the District Court on the question of damages, holding that the bill of lading merely "fixes a final limit of liability beyond which he (the shipowner) shall not be required to respond; it does not profess to regulate the calculation by which a loss is to be ascertained if such loss is less than the limit."

Record, pp. 349, 350.

The shipowner having applied to the Circuit Court of Appeals for a re-hearing (Opinion, pp. 352-9), the Court granted a re-argument solely on the question of the effect of the stipulation entered into betwen the parties *pendente lite* as to bringing forward the cargo.

See Opinion on re-argument, p. 360.

Re-argument having been had, the Circuit Court of Appeals denied the petition to modify the mandate.

See Opinion, pp. 363-4.

Thereupon, the shipowner applied to this Court for writs of *certiorari* in the suits against the *Styria,* which were granted on October 16th, 1900 (Record, p. 378).

Later, on November 12th, 1900, this Court granted cross-writs on the application of the merchants in the suits for charges, and directed that the petitions be filed with the original petitions (Morgan *v.* Austro-Americana S. S. Co., and three other cases, 179 U. S., 685).

POINTS.

I.—The decision of the District Court on the merits was right and should be sustained.

There is no dispute on the facts. The only witness examined on the merits was Captain Scopinich, master of the *Styria.* The rest of the evidence was documentary. Both the District Court and the Circuit Court of Appeals agreed in their findings of fact. Nor was there serious difference between the lower Courts as to the rights of the parties under the bills of lading. The main difference between the two Courts was in the conception of the duties of the master in the circumstances. The learned Circuit Judge who wrote the opinion of the Circuit Court of Appeals failed to appreciate the obligation resting on the master.

The District Judge stated this obligation thus:

"The master as the agent of all concerned is bound to a

prudent regard for the interests of the cargo and 'must endeavor to hold the balance evenly' between ship and cargo, when their interests conflict. The *Julia Blake,* 107 U. S., 418," and other cases cited.

Opinion, Judge Brown, fol. 942.

" The discharge and storage of the cargo, however, was an act necessarily involving considerable expense to the shipper or consignee; and before imposing such an expense upon the cargo, the master, in my judgment, was bound, in view of the daily reports of current negotiations and the expectations of the exception of sulphur, to wait a reasonable period for satisfactory assurances in that regard. No doubt any delay entailed some loss upon the ship, and what should be deemed a reasonable period ought to be determined with reference to the circumstances and interests of both. But, taking the circumstances altogether, I am of opinion that the commencement of the discharge on the 27th was too hasty and precipitate; and that the master was guided in that matter by the telegram from Burrell & Son, the managing agents in London, rather than by his own judgment on all the circumstances known to him at the time. Had he been left to exercise his own judgment, I do not think, upon the testimony, that he would have discharged the cargo—especially not at the time he did; and that before he left Italy, although there was no formal publication of the exception of sulphur, there were such informal assurances coming from the Spanish Government as left no reasonable apprehension of danger from sailing with a sulphur cargo."

Fols. 944-6.

We submit that Judge Brown's statement of the duties of the master is in harmony with the leading decisions of the Admiralty Courts.

In the case of the *Gratitudine* (3 C. Rob., 240, 261), Lord Stowell said:

" Suppose the cargo to be not instantly perishable, but that it can await the repair of the ship, what is the master to do in the situation before described, being a stranger in a foreign port, in a state of distress, without an opportunity of communication with the owners or their agent? What is his duty under such circumstances? It may be answered, generally, to look out for the means of accomplishing his contract, if possible; that is, the safe conveyance of the property intrusted to his care, in that same vehicle which he had contracted to furnish."

The duty of the shipmaster to care for cargo in extraordinary cases is well stated by Sir Robert Phillimore in the *Onward* (L. R., 4 Adm. & Eccl., 38, 57):

"The next consequence from the doctrine of agency is that the master must sustain, to the best of his power, the interests of the absent owner. This is a principle of general maritime law and not like the former one of English law only. Boulay-Paty observes: 'Il est le représentant des chargeurs absens; il doit faire ce qu'ils feraient eux mêmes s'ils étaient sur les lieux.' Cours de Droit Commercial Maritime, tom. 2, p. 404, ed. 1834—that is, he must do what there is fair reason to suppose the owner, if present, would do. 'Il est donc' (Emérigon says) 'obligé de faire ce qu'il est à présumer que feraient les chargeurs s'ils étaient présens,' quoted by Boulay-Paty, Cours de Droit Commercial Maritime, tom. 2, p. 403, ed. 1834."

In the exhaustive statement of this duty of a shipmaster to care actively for the cargo interests, the English Exchequer Chamber approved the German Code, which expressly requires a master to reclaim cargo, in case of capture and detention, and to take all extra-judicial or judicial steps for its recovery, if otherwise taken out of his charge.

Notara *v.* Henderson, L. R., 7 Q. B., 225, 234.

Even when excepted perils may have required the goods to be landed and stored, the carrier cannot leave them and abandon the voyage.

The *Maggie Hammond*, 9 Wall., 435.

The Circuit Court of Appeals did not recognize the duty resting on the master in reference to the cargo. They say:

"Both nations had united in proclaiming to the whole world that they were at war, and we know of no reason why the master of any vessel of a neutral nation was bound to wait twenty-four hours, or twenty-four days or twenty-four weeks, to see if the two belligerents would not settle their differences."

Opinion, C. C. A., p. 344:

"When two nations formally proclaim the existence of a state of war between themselves with all the solemnity observed in this instance, it would seem to be going too far to say that parties whose contracts are affected thereby should wait some

indefinite time, which a court shall find reasonable, in a vague expectation that the belligerents may think better of it and make peace."

Opinion, C. C. A., 345.

Neither of the above statements has any fair application to the circumstances of the cases at bar. The very day that the master of the *Styria* finished loading his cargo, April 25th, 1898, the Giornale di Sicilia, in the issue of 24-25 April, announced that the Italian Minister for Foreign Affairs had promised to telegraph to the Italian Ambassador in Madrid to obtain from the Spanish authorities the exclusion of "brimstone from being considered contraband of war in the Spanish-American conflict."

Malcomson, Ex. D, 19, p. 2214.

One week later, in the issue of 1-2 May, the Giornale di Sicilia announced, in the form of a dispatch from its correspondent in Rome, that the Spanish Government had "determined to exclude brimstone on the list of contraband of war." A further dispatch from Rome published in the same issue was as follows:

"ROME, 1. The 'Official Gazette' will publish the decision regarding brimstone. Meantime the Spanish Government has already ordered the commanders of its ships to allow brimstone to pass free. Several Sicilian deputies who went to the Consulta received full confirmation of what I telegraph you."

Malcomson, Ex. D 23, p. 215.

The next issue of the Giornale announced that the Consulta had decided not to publish in the Official Gazette the Spanish Government decision:

"But the Minister of the Interior sent a circular to all the Prefects in Sicily informing them of the Orders relative to the free navigation of cargoes of Brimstone."

Malcomson, Ex. D 24, p. 216.

The next issue of the Giornale, that of 5-6 May, contained an official announcement by the Italian Minister of Agriculture, Industry and Commerce that "in consequence of our request,

the Spanish Government has given notice to the commanders of its vessels to let sulphur pass free."

Malcomson, Ex. D 25, p. 216.

All these papers Captain Scopinich read.

See Stipulation, fol. 802.

The Circuit Court of Appeals states that not until May 6th did any of the reports bear the stamp of authority (p. 546); but in this the Court is mistaken. It was on the 29th of April that the commanders of Spanish ships were directed to allow brimstone to pass free. We have three independent pieces of evidence of this.

1. The announcement is made in the Giornale di Sicilia of 1-2 May (fols. 859-860).

2. In a letter to the Secretary of State, Mr. Iddings, of the U. S. Embassy in Rome, states that he has obtained the following information from the Italian Foreign office:

"The verbal communication made to the Royal Ambassador (at Madrid) concerning the orders given to the commanders of Spanish ships to respect sulphur, was made on April 29, 1898."

Malcomson, Ex. 18, fol. 851.

3. In a letter to the Secretary of the Newcastle Protection and Indemnity Association (*Styria*, Ex. D 16, p. 211) Mr. Villiers, of the British Foreign Office, says that on May 6th, "as a result of representations made by Great Britain and Italy, the Spanish Minister for Foreign Affairs, *who had previously informed* the Italian Ambassador in the same sense, verbally stated to Her Majesty's Ambassador at Madrid that while the decree of April 23d could not be altered, orders would be given to the Naval Departments, as a temporary measure, not to treat sulphur as contraband of war" (fol. 842.) The words italicized show that the Italian Ambassador had received information from the Spanish Foreign office previously.

It is thus perfectly clear that the positive statement published in the Giornale di Sicilia of 1-2 May, that the Spanish Government had already ordered the commanders of its ships to allow

brimstone to pass free, was authoritative—as authoritative as the telegram from the Minister of Agriculture, Industry and Commerce published in the issue of May 5-6 (Malcomson, Ex. D, p. 25). At least five days before the brimstone was discharged, the master of the *Styria* knew that there was no need of discharging it. Certainly this was, as Judge Brown said, "too hasty and precipitate."

II.—The expenses incurred by the master of the ship in discharging, storing, and re-loading the cargo were properly disallowed by the District Court and improperly allowed by the Circuit Court of Appeals.

If the District Court was right in its view of the duty of the master, then there was no excuse for discharging the cargo without waiting a reasonable time to ascertain the result of the negotiations which he knew were pending.

His own excuses for the discharge are insufficient. His first statement was that he discharged the brimstone under instructions from his managing owners.

"Q. What was the reason for putting it ashore? A. I acted according to instructions" (fol. 411).

"I did not act on my own judgment.

"Q. Not at all? A. No" (fol. 457).

Later he testified as follows:

"The principal reason was because I was ordered; and, secondly, that I had the bill of lading clause that fully authorized me when I deem it not safe to proceed with the cargo that was declared contraband of war" (fol. 492).

The day that he began the discharge, April 27th, the master wrote to the Austrian Consul as follows:

"Please take notice that by order of the representative of my owners, for facts of war, I am discharging the Austrian Steamer *Styria*, commanded by me, at expense and risk of whom it might concern, under care of the mercantile agent," etc. (fols. 431-2).

The shippers protested. Captain Scopinich says:

"I received protests a couple of days after starting the discharge—two or three days after we commenced unloading, and on one occasion I received a telegraphic protest" (fol. 446).

On May 2d, Sofio & Company of Messina, as representatives of the libellants Morgan, served upon the master a formal protest on account of his having discharged and deposited their sulphur in Porto Empedocle.

Record, p. 193, fols. 770-2.
Scopinich, fol. 466.

On May 5th, Captain Scopinich replied by a protest in which he said:

"Petitioner in discharging cargo proceeded as was his right and in the interest of the goods. This is confirmed by the fact published in the papers and discussed on the Italian parliament, that sulphur had been declared contraband of war by one of the fighting nations." He further protested "against all delay, expenses and damages which they suffer through the obstinacy of Messrs. John Sofio & Company, and asks them to reimburse all expenses of discharge," etc.

Styria, Ex. B1, fols. 779-781.

On May 17th proceedings were begun in Captain Scopinich's behalf to sequestrate the sulphur for the expenses incurred.

Styria, Ex. B, pp. 194-5.

From these documents and the testimony of Captain Scopinich it appears:

(1) That the master discharged the sulphur under the instructions of the owners of the *Styria*.

(2) That the shippers protested against the discharge.

(3) That the master knew of the negotiations between the Italian and Spanish Governments.

(4) That before the master had completed the discharge of the sulphur at Porto Empedocle these negotiations had been successful and the master had read in the newspapers that the

Spanish Government had agreed not to treat sulphur as contraband of war.

(5) That the alleged "facts of war" were not such as to justify the master in discharging the brimstone when he did, and that none of the clauses of the bill of lading relied upon gave him the right to do so.

The blockade clause of the bill of lading has no application to the port of shipment. It provides that "in case of blockade or interdict of the port of *discharge*, or if * * * the master shall consider it unsafe for any reason to enter or discharge the cargo *there*, he is to have the option of landing the goods," etc., etc.

If the master discharged the brimstone under the blockade clause, the discharge was wholly unjustified.

The transhipment clause of the bill of lading is equally unavailing. Judge Brown says:

"And any such transhipment being at her own option and for her own convenience, all the expenses of discharge, storage and re-shipment would fall upon the ship, as in any other case of a transfer and re-shipment under clause (c)."

Opinion, fol. 951.

III.—Damages.

The Circuit Court of Appeals sustained the contention of the merchants that the District Court erred in the rule it laid down as to damages.

The limitation clause of the bill of lading is as follows:

"The Shipowner is not to be liable for any damage to any Goods which are capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods, nor for claim for damage or detention to goods under Through Bills of Lading where the damage is done or detention occurs whilst the goods are not in the possession of the Shipowner, *nor in any case for more than the invoice or declared value of the goods, whichever shall be the least.*"

Fols. 753-754.

The Commissioner, who assessed the damages, felt himself bound by the rulings of the learned District Judge in previous cases and made a report allowing the libellants only the difference between the invoice value and the net proceeds of sale, $144.92.

Record, fols. 1011-2.

The libellants excepted to this report on the ground:

1. That "the Commissioner adopted an erroneous method of assessing the damages, the true measure of damages being the difference in value of the sulphur at the time and in the place it should have been delivered, viz: June 3d, 1898, at New York, and at the time of its actual delivery in October, 1898."

2. "That he erred in holding that the clause in the bill of lading limiting the liability to the invoice or declared value of the goods was applicable to the case."

3. That "if the said clause does apply the Commissioner erred in his interpretation of it, the true meaning of the clause being that cargo owners may recover up to but not beyond the invoice value of their goods."

Libellants' Exceptions, p. 284.

The exceptions were overruled by the District Judge, who said: "By the contract of the bill of lading, the invoice value is the *basis* of settlement of any loss or damage."

Opinion of Judge Brown, p. 295.

From the decree so far as it awarded only $144.92 damages, the libellants appealed to the Circuit Court of Appeals (p. 306); and in their assignments of error raised the question of the method of assessing damages and the application of the limitation clause of the bill of lading.

Assignments of error, p. 322.

The Circuit Court of Appeals reversed the District Court, saying:

"We are unable to concur in the interpretation put upon

this clause, for the reason that the language used does not seem to import any such idea. The statement that the shipowner shall not be liable in any case for more than the invoice value of the goods is a simple and straightforward one; grammatically construed it fixes a final limit of liability beyond which he shall not be required to respond; it does not profess to regulate the calculation by which a loss is to be ascertained, if such loss is less than the limit. To give them such a meaning would seem to be to substitute for the contract the parties have made another and different one, which they might easily have made for themselves, had they wished to do so."

Opinion C. C. A., pp. 349-350.

We contend:

1. That the clause of the bill of lading has no application in a case like the present of refusal to deliver.

2. That if the clause did apply in the present suits, the interpretation put upon it by the Circuit Court of Appeals was right and that of the District Court was wrong.

1. The clause has no application in the present case.

An examination of the clause of the bill of lading shows that the limitation of liability to the invoice value is not designed to meet a case of total loss or non-delivery. What it says is that "the shipowner is not to be liable for any *damage* to any goods, etc., * * * nor for any claim" (that is, claim for *damage* to goods), "notice of which is not given, etc., * * * nor for claim for *damage or detention to goods* under through bills of lading where the *damage* is done or *detention* occurs, etc., * * * nor in any case" (that is, in case of *damage* or *detention*) "for more than the invoice or declared value of the goods, whichever shall be least."

Fol. 753.

The suits against the *Styria* are not brought to recover for *damage* to goods nor for *detention* of goods. They are brought for the refusal of the shipowners to deliver the goods at all. If the ship, after loading, had taken the goods to Bombay or Cape Town instead of delivering them at New York to the consignees,

could the shipowner have claimed that his liability was limited to the invoice value of the goods? Such a breach of the contract would have taken the shipment out of the purview of the bill of lading and the shipowner would not have been able to avail himself of any exceptions in the bill of lading.

The fact that the goods were brought forward to New York in September by another steamer and delivered to the libellants under the stipulation of August 12th does not change the nature of the suits.

We have interpreted the bill of lading strictly, but we have a right to do so. Words of exception and limitation must be construed most strongly against the party for whose benefit they are introduced.

Compania La Flecha *v.* Brauer, 168 U. S., 104, 118.

In the case of Calderon *v.* The Atlas S. S. Co. (170 U. S., 272), the bill of lading provided that "the carrier shall not be liable for goods * * * of any description above the value of $100 per package unless the bills of lading are signed therefor with the value therein expressed and a special agreement is made."

The steamship company insisted that the words of this clause "which are above the value of $100 per package" should be construed as if the words used were "beyond the sum or value of $100 per package." Although the lower courts agreed in putting this interpretation upon it, this Court said:

"But this certainly does violence to its language. If it had been intended to so limit the respondent's liability it would have been easy to say so" (p. 279).

And again, on p. 281, Mr. Justice Brown said:

"In this case the contract is one prepared by the respondent itself for the general purposes of its business. With every opportunity for a choice of language, it used a form of expression which clearly indicated a desire to exempt itself altogether from liability for goods exceeding $100 in value per package, and it has no right to complain if the Courts hold it to have intended what it so plainly expressed."

Moreover, as the improper discharge of the brimstone at the

port of shipment was an act *personal* to the shipowner, the limitation clause has no application.

The purpose of such a clause is to limit the liability of a shipowner for acts of his sea servants upon the voyage. If the fault is with the owner or his land agents, clauses like these have no application. *A fortiori* they do not shelter the carrier in a wilful conversion. In all such cases the invoice value clause has no application because relating only to matters "occurring on the voyage."

In Tattersall *v.* National S. S. Co., 12 Q. B. D., 297, where the bill of lading for cattle protected the shipowners by providing that "under no circumstances shall they be held liable for more than £5 for each of the animals," the Court held that this applied only to occurrences during the voyage, and not to the duty to have a fit ship.

The like principle is laid down by the French Court of Cassation.

Cie. Transatlantique *v.* Devoto (see Appendix).

2. But if the clause were applicable in the present suits, the District Court erred in its interpretation of the clause.

Judge Brown made the words "not to be liable * * * for more than the invoice * * * value," equivalent to "all claims to be settled on the basis of invoice value."

Opinion of Judge Brown on exceptions, p. 295.

This interpretation of the bill of lading "certainly does violence to its language." The language of the bill of lading is perfectly clear that the shipowner is not to be liable in certain cases "for more than the invoice or declared value of the goods." In other words, no matter what damages the merchant may have sustained, he can in no case recover more than the invoice or declared value of his goods. Or, to put it in another way, the damages should be assessed according to the established rules of law, and if they exceed the invoice or declared value of the goods, then recovery must be limited to that invoice or declared value.

As the meaning and effect of this clause have not been passed on by this Court, nor until the present decision by any Circuit

Court of Appeals, it is proper to refer to the cases relied upon by the District Judge.

In the case of the *Hadji* (18 Fed. R., 459) Judge Brown had before him a bill of lading which provided that in case of damage, loss or *non-delivery*, the shipowners are not to be liable for more than the invoice value of the goods. The Commissioner adjusted the damages upon the basis of 6½ cents per yard as the market value of the goods at the port of destination if uninjured. Exceptions were filed on the ground that the allowance should have been 5 cents, the invoice price, and Judge Brown allowed the exceptions.

In the case of the *Lydian Monarch* (23 Fed. R., 298) where some bales of burlap were injured through negligence, Judge Nixon of the New Jersey District followed the decision of Judge Brown in the *Hadji*, saying that the stipulation of the bill of lading was in the exact words of the contract in that case, and adding:

"The amount due must be adjusted upon the above principle of computation, and if it should turn out that if the libellant has received from the sale of the damaged goods the invoice price after deducting the costs of importation, sale, etc., the libel will be dismissed."

In the case of Pearse *v.* Quebec S. S. Co. (24 Fed. R., 285), which was another phase of the *Hadji* case, Judge Brown held that on a partial injury the damage is to be computed on the basis of the invoice value of the goods damaged, their net proceeds being credited against their invoice price and freight, the carrier to be held for the difference only.

Although the *Hadji* was affirmed by the Circuit Court (Judge Wallace) this question of damages does not seem to have been raised.

The *Hadji*, 20 Fed. R., 875.

There is one other Circuit decision, the *Alene* (25 Fed. R., 562) where Mr. Justice Blatchford, holding the Circuit Court, sustained a similar exception. The District Court had allowed the market value of oranges frozen, less the freight. Judge Blatchford limited the recovery to the invoice value and deducted the freight from that.

We contend that these decisions are erroneous, and we ask this Court to affirm the decision of the Circuit Court of Appeals on the question of damages and give to the plain language of the exception its fair meaning.

In the case of Brown *v.* Cunard S. S. Co. (147 Mass., 58) Mr. Justice Holmes stated the law as we believe it to be. He refused to follow the decisions of Judge Brown and Judge Nixon and said:

"The damages are to be ascertained in the usual way by finding the difference in value between each package as damaged and the same undamaged, and these damages are to be paid by the defendants up to but not exceeding one hundred pounds, when the value is not declared, or, in this case, up to but not exceeding the invoice value. As the damage to plaintiff's walnuts did not exceed the invoice value, the defendant must pay the whole amount."

III.—The stipulation of August 12, 1898, did not modify the ship's liability.

After the decision of the Circuit Court of Appeals application was made for a re-argument, which was granted upon the question of the effect of this stipulation (Record, p. 60). The Court refused to alter its decision, and in a brief opinion (pp. 363-4) stated clearly what the real purpose of the stipulation was.

At the time the stipulation was executed libels had been filed against the *Styria* claiming $69,800. The claimant had given security in the sum of $42,500, the appraised value of the steamship.

The war was virtually over. The sulphur was lying in warehouse in Sicily. The trial of the suits for damages was in the remote future. No answer had then been filed by the claimant. None was filed until December 1st, 1898.

The stipulation provided that the claimant should forward the sulphur to the consignees and deliver the same on payment of the freight specified in the original bills of lading; "the goods upon arrival to be sold at current market rates, and the

proceeds, less charges incurred, to be credited on account of the damages, if any, recovered by the libellants."

The stipulation gave the claimant a lien on the sulphur for the expenses of discharging, storing, etc., provided it should be found by the Court that the claimant was justified in re-landing and storing the cargo, as and when he did.

The remainder of the stipulation is as follows:

"It is the purpose and intent of this paragraph of the stipulation to provide that if the claimant was justified in re-landing and storing the cargo as and when he did, he shall have a lien upon the respective consignments for their respective proportions of the charges and expenses against the same, which the libellants would have to pay (exclusive of the charges provided for in the first paragraph of this stipulation), if they undertook to forward the cargo for their own account.

"3. This stipulation, and anything done by any party under it, shall be deemed to be wholly without prejudice in the pending suits, except as herein provided."

The owner of the *Styria* was under a liability of a peculiar character. Being guilty of fault in having discharged the brimstone or in not re-loading it after the proclamation against brimstone had been withdrawn, he was still custodian of the goods and under an active duty to forward to destination.

Its breach of contract having left the owner of the *Styria* unprotected by any of the exceptions of the original bill of lading, in the absence of express authorization from the cargo the claimant became an insurer—under an absolute liability—until the delivery should be made at New York.

The parties to this stipulation were simply arranging to end the deadlock at Porto Empedocle. The consignees wanted the brimstone or its value; the shipowner wished to recover freight, and all proposed to stop the running of warehouse charges and expenses..

The petition for rehearing intimates that if no such stipulation had been made, the claimant could have brought the goods on, appropriated to itself the market value here, and been answerable only for invoice value.

The petition contains the following statement:

"If the shipowner had not brought the cargo forward at all,

and had been adjudged to pay damages for its non-delivery, the damages would have been limited by the invoice value, and the shipowner would then have been entitled to the sulphur. He could have brought it forward himself and sold it in this market, for the price at which the libellant sold it, and the proceeds of the sale would have substantially paid the judgment for damages."

Record, p. 357.

So in their brief in this Court the counsel for the *Styria* contend that by a species of subrogation on paying the invoice value of the brimstone to the libellants, the owners of the *Styria* would have become entitled to sell the brimstone for their own profit.

Brief for *Styria*, pp. 99-107.

In other words, counsel would maintain that the "invoice value" clause gives the shipmaster an option. His duty to care for cargo is not that single, clear, and disinterested obligation that, according to Lord Stowell, rests upon the master. He may appropriate the goods, if he please, and then coolly offer the invoice value as the only compensation. This option extends even after the goods are out of the ship and the master has become the special agent *ex necessitate* of absent cargo owners!

To such an uncandid and ridiculous contention there are abundant answers.

1st.—Any such clause that would give the vessel the right to use and appropriate the advance in market value of another's property—to claim an offset by reason of it—even if clearly set forth in the contract—would be void as contrary to public policy.

In the case of Pearse *v.* Quebec Steamship Co., 24 Fed. R., 285, 288, Judge Addison Brown said that if it were attempted "to charge against the invoice value of the whole, the amount realized in a foreign market for the whole cargo, damaged and undamaged, that construction would be giving to the carrier the full benefit of the foreign market value which is expressly denied to the shipper—a result not presumably within the intention of the parties." * * * "If the construction contended

for by the claimant were the proper meaning of this limiting clause, it would be void upon grounds of public policy, as unreasonable, and *as affording a direct encouragement to the theft or non-delivery of the shipper's goods.*"

2d.—The principle of *ejusdem generis* requires that the clause here be applied to loss or damage, *i. e.*, the injury or deterioration of the goods. It would not apply to sound cargo, which by reason of advance of market the carrier should elect not to deliver, and then claim to make the owner submit to invoice value as the limit of compensation.

3rd.—The invoice value clause would not have permitted the claimant to refuse to do his duty at the time of this stipulation. On the contrary, the law had cast on the claimant a special obligation independent of contract to care for, protect, and bring forward the cargo, and held up as a standard of liability for the breach thereof an undiminished responsibility for the full market value which the cargo would have realized had it been forwarded on the *Styria*.

4th.—The duty of the master to care for cargo in an emergency transcends any words of a bill of lading. No clauses inserted by the shipowner can be suffered to impair its full obligation. In the case of Ralli *v.* Troop, 157 U. S., 386, 397, this Court, speaking by Mr. Justice Gray, said:

"The authority of the master may be treated as resting either on implied contract of the parties, or on the duty imposed upon him by the law, as incident to his station and office, to meet the necessity created by an emergency which could not be foreseen or provided for, and to prevent the property in his custody and control from being left without protection and care."

5th.—The obligation to *care* for cargo—a duty arising from the bailment—is especially preserved by the Harter Act. Section 1 prohibits and annuls all clauses tending to relieve the owner from negligence, fault, or failure in "custody, care, or proper delivery" of the goods; and Section 2 prohibits any such clauses as would relieve against the acts of others, or their obligations "to care for and properly deliver" the cargo. Hence

these clauses cannot have the effect contended for, without contravening this statute.

Act of Feby. 13, 1893, Sections 1 and 2.

Whether the suits be regarded as for non-delivery or for delay in delivery, the result is the same.

(1) Counsel for the *Styria* contend that the suits are for non-delivery (Brief for *Styria*, pp. 77-8 *et seq.*). They say:

"There was, therefore, a total breach of contract in each case, and the libellants were entitled to those damages, and only those damages, which the ship owner would be bound to pay for a total breach, as of the day of the arrival of the *Styria* in New York."

Brief for *Styria*, p. 78.
See also Brief, pp. 93 and 110.

Citing the case of Smith *v.* Tregarthen (52 L. J. Q. B., 437; 6 Asp. Mar. Cas., 137), counsel for the *Styria* say:

"The Court of Appeals should have followed the rule of the English case, and should have held that the subsequent delivery by the *Abbazia*, October 6th, could only be taken into account in reduction of the damages which accrued June 3rd for non-delivery *ex Styria*, as limited by the invoice value."

Brief for *Styria*, p. 110.

At this point the learned counsel, following the District Court's erroneous interpretation of the limitation clause, use the invoice value as the "basis" of their calculation instead of using it as "a final limit of liability."

It is the *market*, not the *invoice*, value of the goods "at the time when they ought to have arrived" that is the true measure of damages in case of non-delivery (see opinion of Day, J., in Smith *v.* Tregarthen, supra). And it is from this market value that the proceeds of sale are to be deducted, not from the invoice value.

(2) If the suits be regarded as for damages resulting from delay in delivery, the measure of damages is the difference between the value of the brimstone when it should have ar-

rived and its value when it did arrive, which gives the same result as a recovery for non-delivery with the proceeds of sale credited in accordance with the stipulation of the parties.

The provision for crediting the net proceeds was intended to take the proceeds (after payment of liens) and credit them against the amount that would be recoverable as damages on the existing state of facts, should the liability of the master be established.

The term "crediting" the proceeds meant that the proceeds as ascertained by an immediate sale on arrival would go in mitigation or reduction of damages—but what would be the exact measure or standard for those damages, the stipulation did not profess to decide. Indeed, it declared that such an arrangement by transhipment and sale should be without prejudice.

As the Circuit Court of Appeals said in its opinion on the reargument:

"When, therefore, the stipulation provided that the proceeds of the sulphur to be brought forward under its terms should be credited on account of the damages, it certainly was not intended that it should be credited twice, once by the application of the rule for determining difference of market values, and again by deducting the amount of such proceeds from the balance found upon applying the rule for ascertaining damages which the transactions and documents required."

Opinion, p. 364.

IV.—THE DECREE OF THE CIRCUIT COURT OF APPEALS IN THE ABOVE ENTITLED SUIT SHOULD BE AFFIRMED WITH COSTS TO THE LIBELLANTS, AND IN THE CROSS SUIT FOR CHARGES THE DECREE OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED, AND THE DECREE OF THE DISTRICT COURT DISMISSING THE CROSS-LIBEL SHOULD BE AFFIRMED WITH COSTS.

November, 1901.

WING, PUTNAM & BURLINGHAM,
Proctors for Morgan.

CHARLES C. BURLINGHAM,
HARRINGTON PUTNAM,
Of Counsel.

APPENDIX.

Cour de Cassation.—Chambre des Requetes.
(3 mars 1897.)

Connaissement. Clause limitant la responsabilité. Avaries de route. Application. Fait personnel de l'armateur. Inapplication. Art. 1382. C. civ.

Navire: *Versailles.*

Les clauses d'un connaissement limitant en cas d'avaries le montant de l'indemnité à payer pour les marchandises, n'ont de valeur que pour les avaries de route, dont l'armateur peut s'exonérer en totalité ou en partie.

Mais elles ne peuvent être opposées pour des avaries provenant du fait personnel de l'armateur; en pareil cas, aux termes de l'article 1382 du Code civil, il est obligé de réparer le dommage dans son intégralité.

C^ie^ Générale Transatlantique *c.* Devoto.

arrêt.

Moyen unique.—Violation et fausse application des articles 1134 et 1152 du Code civil, fausse application de l'article 1382 du même code; violation des articles 103 et suivants du Code de commerce, des articles 283, 286 et 397 même code, et 7 de la loi du 20 avril 1810; en ce que ledit arrêt a formellement violé les termes clairs et précis d'un connaissement d'après lesquels l'indemnité due par la Compagnie Transatlantique pour perte et avaries de marchandises dont elle était responsable, devait être calculée d'après la valeur de ces marchandises *au port de charge.*

La Cour,

Sur le moyen unique,

Attendu qu'à la suite de l'échouement du steamer *Versailles* dans le port de Marseille, par une circonstance dont la Compagnie Transatlantique a été déclarée personnellement responsable, les réclamateurs de cafés et de sucres atteints par l'eau

(*Translation.*)

COURT OF CASSATION.—CHAMBER OF REQUESTS.

(March 3, 1897.)

Bills of Lading. Clause limiting responsibility. Damage on the voyage. How applied. Personal act of the shipowner. Not applicable. Art. 1382 Civil Code.

Ship: VERSAILLES.

The clauses of a bill of lading which limit the amount of indemnity to be paid for merchandise in case of damage are unavailable except in the case of damage in transit for which the shipowner can exonerate himself in whole or in part.

But they cannot be raised in the case of damage resulting from the personal act of the shipowner; in such a case, in conformity with the terms of Article 1382 of the Civil Code, he is obliged to make good the whole damage.

THE COMPANY TRANSATLANTIQUE *v.* DEVOTO.

DECISION.

Only ground: Violation of and improper application of Articles 1134 and 1152 of the Civil Code, improper application of Article 1382 of the same Code; violation of Articles 103 *et seq.* of the Code of Commerce, of Articles 283, 286 and 287 of the same Code, and Article 7 of the law of April 20, 1810; inasmuch as the said decision has formally violated the clear and precise terms of a bill of lading, according to which the indemnity due from the Compagnie Transatlantique for loss and damage to merchandise for which it was responsible, ought to have been calculated according to the value of the merchandise "at the loading port."

The Court

On the only ground:

Whereas in consequence of the stranding of the steamer *Versailles*, in the port of Marseilles, in consequence of a cause for which the Compagnie Transatlantique has been declared personally liable, the claimants of the coffee and the sugar

de mer ont demandé à titre de dommages-intérêts la différence entre le net produit de leurs marchandises en vente publique et le prix qu'ils en auraient retiré s'ils avaient pu les vendre à l'arrivée en état sain; que la Compagnie a opposé l'article 19 du connaissement aux termes duquel "en cas de perte ou d'avarie elle ne peut être tenue de rembourser que la valeur intrinsèque de la marchandise calculée au port de charge;"

Attendu qu'en décidant que cette clause visait seulement les avaries de route dont l'armateur pouvait se décharger en tout ou en partie, et non les avaries provenant du fait personnel de la Compagnie, obligée par l'article 1382 à réparer l'intégralité du dommage, la Cour de Paris, par arrêt du 3 mars 1896, n'a fait que préciser l'intention commune des parties et a interprété, sans la dénaturer, la convention, objet du débat;

Rejetté

Du 3 mars 1897.—Présid.; M. Tanon; MM. Letellier, rapp.; Duval, av. gén.; Me Dambeza, av.

(*Revue internationale du Droit maritime*, vol. xii, p. 660.)

damaged by sea water have claimed as their damage the difference between the net proceeds of their merchandise at public sale and the price which they would have received, if they had been able to sell them on arrival in a sound condition; the company having opposed article 19 of the bill of lading, according to the terms of which, "in case of loss or damage, it cannot be held liable to pay more than the intrinsic value of the merchandise, computed at the port of loading;"

Whereas, in deciding that this clause applied solely to damages in transit, for which the shipowner could have exempted himself in whole or in part, and not to damages resulting from the personal acts of the company, which it was obliged by Article 1382 to make good in full; the Court of Paris, by its decision of March 3, 1896, has done no more than to express more precisely the mutual intention of the parties, and has interpreted, without misconstruing the contract, the object of the controversy,

Rejected.

March 3, 1897.—Pres. M. Tanon; MM. Letellier, rapp.; Duval, Advocate General; Mr. Dambeza, Atty.

No. 692
Brief of Bowers & Reed for Resp.
Office Supreme Ct.
FILED
MAY 28 19
JAMES H. KENNEY

Supreme Court of the United States.

Filed May 28, 1900.

SCHUYLER L. PARSONS,
Libellant Appellant,

vs.

THE STEAMSHIP "STYRIA,"
&c.
A. G. SCHOPINICH, Master,
Claimant-Appellant.

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Brief for Libellant in Opposition to Motion for Writ of Certiorari.

BOWERS & SANDS,
Proctors for Libellant,
31 Nassau Street, N. Y.

JOHN M. BOWERS,
LATHAM G. REED,
Of Counsel for Libellant.

Supreme Court of the United States.

SCHUYLER L. PARSONS,
Libellant-Appellant,

vs.

THE STEAMSHIP "STYRIA," &c.
A. G. Schopinich, Master,
Claimant-Appellant.

BRIEF FOR LIBELLANT OPPOSING MOTION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS IN THE SECOND CIRCUIT.

No conflict exists between any of the Courts of Appeal on the questions involved in this motion; nor is there any other matter involved affecting the interests of the nation in its internal or external relations—Forsyth *vs.* Hammond, 166 U. S., 506; 172 U. S., 648; 167 U. S., 454.

Notwithstanding the elaborate petition in presentation of this motion, the essential circumstances of this case give it no importance, and this Court will find on even a casual analysis, that on the merits there is nothing involved but a consideration of the weight which reports of events in the public prints, and current mercantile news at the Sicilian port of shipment concerning the action by the Italian and Spanish Governments as to allowing crude brimstone from Italy to go unmolested, should have had upon the master of the vessel, and his duty under the circumstances.

Libellants contended that as it was daily reported in the public prints at the port of shipment, which reports the master testified that he knew (and which were true reports), that efforts were being made from the moment the war broke out to let Italian sulphur pass unmolested, the master ought to have waited to see the event of these negotiations between Italy and Spain before precipitately discharging.

And so the learned District Judge held.

The Circuit Court of Appeals, however, held that the master was not bound to await the event of these negotiations (which lasted about ten days and were progressively and finally successful), but was justified in discharging immediately upon learning of the existence of the war.

What more can the claimant ask in that regard?

The Circuit Court of Appeals also held that the vessel was entitled to her expenses of discharging

What more can the claimant ask in that regard?

> *The Circuit Court of Appeals also held that the vessel ought to have reloaded before she left Sicily, because, before she left; it was publicly and officially proclaimed by the Italian Government authorities that Spain had declared Italian sulphur would not be molested by Spain, as the result of the negotiations, and that it could be safely carried.*

The Court of Appeals also held that for the expenses of such reloading the vessel would have been entitled had she reloaded and brought the cargo; and that the claimant was also entitled to be re-imbursed such expenses when it brought forward the sulphur some months later on another vessel of the same line.

What more can the claimant ask in that regard?

The whole question, then, is that involved in the ruling which we have placed in italics a few lines back.

1292

Ought the vessel to have reloaded owing to the fact that prior to her sailing sulphur had lost its contraband character?

If she neglected her duty in that regard she was liable to the libellants for their *loss of market;* but the sulphur remained the property of the libellants.

If she did not neglect a duty, *i. e.*, if there was no duty to carry the sulphur, then no liability rested upon her for any loss to the libellants.

So that it comes down to the simple question of common shipping law; if a vessel has contracted by her bill of lading to carry a cargo which immediately thereafter becomes contraband (it is immaterial whether the cargo was actually loaded and then put overboard; or had not yet loaded), is she bound to load and carry the cargo, if, prior to her sailing, the cargo becomes non-contraband? Is the contract of carriage discharged?

That was the precise situation in the case at bar, and that is the simple question involved in this case.

Other vessels loaded with brimstone sailed for American ports from Sicily between April 24th and May 8th.

The fact that the question arose out of a certain war does not, we submit, alter its simplicity or give it any greater interest than if it had arisen from facts of a pestilence or some other circumstances from which the situation might have arisen.

It will be borne in mind that the discharge in this case was not justified by the clause of the bill of lading permitting discharge if the master deems it unsafe for any reason to *enter port of discharge:* but it was justified under the clause excusing the delivery of the cargo when restraint of princes intervened.

No question of the right of transhipment is involved; there was no transhipment.

For whatever damages have accrued the responsibility

rests directly upon the managing owners, Burrell & Sons, of Glasgow, and not vicariously through the errors of judgment of the master.

They ordered the sulphur discharged immediately upon the war breaking out, and they never asked of the master, who was on the spot, as to the situation; nor did he send them any information as to the situation, nor concerning the efforts being made to let sulphur go free.

Nor did Burrell & Sons in Glasgow ever make any inquiry at all about the propriety of ordering the goods overboard until May 9th, 1898, sixteen days after they gave the master in Sicily his telegraphic orders to discharge (Record, p. 202; fol. 574).

The motion should be denied.

BOWERS & SANDS,
Proctors for Libellant Parsons.

JOHN M. BOWERS,
LATHAM G. REED,
Of Counsel.

Supreme Court of the United States.

SCHUYLER L. PARSONS,
Libellant,

AGAINST

THE STEAMSHIP STYRIA, A. G. SCOPINICH, Master.
Claimant.

AUSTRO-AMERICANA STEAMSHIP COMPANY, owner of the Steamships Styria and Abbazia,
Libellant,

AGAINST

4,550 cantors of Brimstone owned by Schuyler L. Parsons,
Respondent.

No. 73.

STATEMENT.

These cases have been certified to this Court by the Judges of the Circuit Court of Appeals for the Second Circuit. The cases were in that Court on the cross appeals of the libellant and claimant in the first above entitled case, and on the libellant's appeal in the second case.

They arose out of the action of the Master of the Austrian Steamship Styria in unloading, from the 27th of April, 1898, to the 7th day of May

following, a quantity of crude brimstone at Port Empedocle, which is the Port of Girgenti, in Sicily, consisting of 350 tons or 4,550 cantors of *crude brimstone,* after having loaded them on the 21st of April at the same place (fols. 66-68; 101-103) for transportation to New York, the Master's ostensible reason being that he was afraid to carry the goods "for facts of War" (fols. 106; 110-117; 422-426; 764). We say this was his ostensible reason, because it was the reason which he gave to the shippers by postal card after he had commenced unloading, in pursuance of what he claimed to be his authority for so doing under the bill of lading.

In other words, his reason was that he was afraid that supposed Spanish warships (fol. 493) would "overhaul his ship in the Mediterranean for carrying *contraband* to the United States."

The vessel is an Austrian ship (fol. 389) sailing under the Austrian Flag. The Master is an Austrian (544), although some of the part owners were British (see The Pedro, 175 U. S. 367).

On the 21st of April, 1898, at the aforesaid Port, F. Baller & Co. shipped on board of the Styria, for transportation to libellant at New York (405; 740), 350 tons of *crude brimstone* of the quality known as "Seconds" (78). The vessel had left Trieste, her home port, on April 16th, 1898 (391), and arrived at Girgenti on the 21st, and immediately began loading (392). Apparently the Master commenced to load Parsons' lot on the 21st; but the Master continued loading other lots of brimstone for the other libellants in the cases now before this Court, until the 25th of April (396), when the loading was completed. The vessel cleared at the Custom House on the 24th (409).

Immediately upon the breaking out of hostilities between the United States and Spain, it began to be agitated amongst the Sicilian merchants and exporters of brimstone, to get the Italian Govern-

ment to induce the Spanish authorities to make an exception of sulphur shipped from Italian Ports, and in the daily papers published on the 24th-25th of April, and from thenceforward until on and after the 5th of May, when the vessel sailed without the brimstone, the encouraging progress of these negotiations was daily recounted in the public press and was common talk and excitement among the merchants and officials in the Sicilian Ports, success crowning these efforts on the 29th of April, public proclamation of which was made to the prefects and merchants in Sicily on the 4th or 5th of May.

Of all these efforts and negotiations and of the result, the Master admits he was fully aware (472, 473, 496, 497, 550, 574, 575, 576).

During the progress of these negotiations, the Master continued loading; he finished, as we have seen, on the 25th of April, on a Sunday, and remained loaded the rest of that day and on the 26th of April.

On the 27th of April, under instructions from Burrell & Sons, of Glasgow, who are said to be the managing agents of the ship, the Master began to discharge the brimstone back on the wharf, specifically claiming to do so under a particular clause of the bill of lading, and not otherwise (411, 456, 457, 475, 491, 492, 505, 508).

This was done without any previous notice to the shippers of his intention to do so (427, 512, 514), and without any consultation with them. Nor did the Master notify Burrell & Sons of the negotiations between Italy and Spain as to omitting sulphur cargoes from contraband character (574, 575, 578).

Nor did the Master make any diligent inquiries as to the progress of the negotiations (469, 475); in fact, he indicates that he did not care whether he carried the sulphur or not (524-527), and that his

only notion in the whole proceeding was to follow the instructions of his owners and to make money for the ship (480, 492, 502, 506, 508).

On the 21st of April it seems that Acts of War had taken place between the United States and Spain, and on the 25th the United States, under an Act passed on that day, declared War and stated that it had existed since the 21st.

On the *25th* of April (867), the Queen Regent of Spain issued a Royal Decree, in which it is declared in Article VI., that sulphur is included under the denomination of contraband of War and gave orders to the Royal Navy, Auxiliary Cruisers and Privateers to exercise the right of visit on the high seas and in the territorial waters of the enemy, in order to capture the enemy's ships; and to confiscate the enemy's merchandise under their own flag and contraband of War under any flag.

It does not appear in evidence that this proclamation, or any part of it, was published in Italy, or ever came to the knowledge of the Master, until the 5th or 6th of May, 1898, when there was published the circular issued by the Italian Minister of Agriculture, Industry and Commerce, which proclaimed the freedom of Italian brimstone, and which is found at fol. 863-864.

The Styria sailed from Girgenti on the 8th of May and arrived in New York on June 3, without the brimstone (447). The libellant Parsons immediately filed (100)his libel against the Styria; not until the 1st of December was the answer filed (135). Meantime, for the purpose of mitigating the *damages* then claimed, or which might be allowed, a stipulation (page 15) was entered into on the 12th of August, 1898, between the owners of the Styria and the libellants, that the owners of the Styria should bring on the brimstone that she had discharged, to New York, and that it should be sold and the proceeds, less certain charges, cred-

ited on account of the damages, if any, recovered in these actions by the libellant. In the third clause (63) of this stipulation it is stipulated as follows:

> "3. This stipulation and anything done by any party under it shall be deemed to be wholly without prejudice in the pending suits, except as herein provided."

The brimstone was brought forward by the Abbazia (602), one of the cross-libellant's ships, which arrived in New York in the month of September, 1898 (618, 648), and was sold at a much lower price than if it had been sold at the time the Styria arrived on June 3d (the market price having gone down by the difference between $11,200 and $7,402), (1044). In the said stipulation, it was also agreed that if the Master of the Styria was justified in discharging the cargo *at the expense* of the libellants, the ship owners should have a lien against it for the expenses which they had incurred in discharging it.

In other words, the object of the stipulation was to save any further loss by the brimstone lying idle in the warehouse in Girgenti, and that it should be brought to New York and sold, the rights of the parties to be determined, nevertheless, without regard to anything done under it, except in mitigation of damages. The libellants were to get their brimstone here in New York and sell it instead of disposing of it in Sicily; and thus having received our goods, or the value, the question of our damages was to be litigated at the trial. The claimant's counsel affects to believe that this stipulation was meant or should be held to mean to deprive us of our goods or their value.

The case coming on for trial, the District Court held that the Master was not justified in throwing back the cargo, holding that in view of the well-known negotiations pending for the freedom of

Italian brimstone cargoes, of which the Master was well aware, his action in discharging was precipitate, and as the learned District Court was mildly pleased to call it, on a mistaken theory of the contract rights and duties (1179). The learned District Court also held, rightly as we maintain, that the ship was not entitled to the expenses incurred by discharging and storing the goods in Sicily, because it said that, "there having been an unjustifiable refusal on the part of the Master to continue the voyage * * * * and his contract having been broken to its very inception, it would seem that *none* of the clauses of the bill of lading could be availed of for the benefit of the ship" (fol. 1101).

The District Court refused to allow the libellants the full damages to which the law entitled them, holding, first (and notwithstanding that "none of the clauses could be availed of for the benefit of the ship"), that they had agreed to a limitation thereof, in the bill of lading, to be measured by the invoice price of the goods; and second, that having received their own goods, or the value thereof, the same should be deducted from the invoice price (952, 1110, 1116).

The goods came on to New York and were sold, as already stated, and the ship owners thereafter filed cross libels against the brimstone and its proceeds to enforce the lien which they claimed for their expenses in discharging the cargo in Girgenti (pages 61-92).

The claimant's demand for the expenses of discharging, etc., was disallowed by Judge Brown, but the libellant was permitted to recover only $176.82 (1189). In other words, although the libellants owned their own goods and had in addition suffered heavy loss by the Master's unjustifiable proceedings, justice was deemed to have been done when the libellants were permitted to get their own goods

back with the addition of a small amount of expenses paid by them.

From this very serious denial of justice, the brimstone owners appealed to the Circuit Court of Appeals; and from so much of the decree as held that the Master was not justified in discharging the brimstone in Girgenti, the ship owners appealed, and they also appealed from the decrees which were rendered dismissing their cross-libels.

The Circuit Court of Appeals held that the Master was justified in discharging the brimstone immediately upon hearing that War existed, without waiting an hour, under the compulsion of Restraint of Princes (page 342), basing its decision upon some English cases, although citing the case of Olivera *vs.* Insurance Company, in the 3rd of Wheaton, as an analogue.

But the Circuit Court of Appeals held that the Master was not justified in *sailing* from Sicily without the brimstone, for the reason that, before he sailed, Italian brimstone had been practically declared free, to the Master's knowledge, and that it was his duty thereupon to resume his voyage with the brimstone, and to carry it to New York. It was held, however, that the brimstone owners were bound to pay the expenses incurred by the Master in discharging the cargo and storing it, etc., not only from the time of discharge to the time of sailing, but down to the time of reloading on the Abbazia.

In the matter of damages, the Circuit Court of Appeals held that the damages suffered by the libellants from the Master's disregard of his duty were for the loss of market incurred on June 3, 1898, but that the claimant was entitled to the expenses of discharging, etc., at Girgenti, thus making the libellant in this case entitled to a decree of about $3,694.94.

The claimant then moved for a reargument of

the question of damages, asserting that the Circuit Court of Appeals had ignored the stipulation of August 12, 1898, and that the ship was entitled to have the libellant's damages reduced, first by the amount of the invoice value of the sulphur, and that upon this remainder there should be applied in further reduction, the proceeds of the sulphur in September, 1898. This outrageous and immoral claim was based upon the proposition (page 357, 363), that the claimant had converted the libellant's property in Sicily, because libellant had alleged such a conversion in its libel, and that having converted the libellant's goods and thus grossly abandoned and violated the bill of lading, it was still entitled to apply some of the clauses of the bill of lading against the libellants and pass the title to itself upon the payment of the invoice value of the goods, and that the libellants having already received the price of the goods sold in New York under the stipulation, they were not entitled to receive anything; in fact, if the proposition were carried out to its logical conclusion, that the libellants were indebted to the claimant in a sum of money. The learned Court of Appeals, however, was not impressed with either the sincerity or morality of this claim, and rightly held (pp. 363-364), after a full discussion of the questions, that there had been no conversion of the goods; that if there had been, the ship could not claim exemption under the bill of lading; that there had been merely a breach of contract; that the goods remained the libellants' property, whether they were left in Sicily or brought to New York; that they were entitled at all times to their goods or their value, and that they were entitled, in addition, to their damages suffered for loss of market. The learned Court of Appeals, we think, in thus deciding, committed the immaterial error of mention-

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ing the fact that as these damages did not equal the invoice value of the goods, the clause did not apply. We respectfully insist that the Master having violated the contract and refused to carry the goods at all, was not entitled, under any circumstances, to the benefit of the invoice value clause.

SCHEME OF THE LIBELLANT'S ARGUMENT.

The position which the libellant takes is that the District Court was correct in holding, first, that the ship had no right to unload the sulphur and sail without it; and, therefore, second, that the ship is liable to libellant for so doing; and, third, that the libellants were not chargeable with the ship's expenses in unloading and storing the brimstone in Girgenti; and that the only error in Judge Brown's decision was on the question of damages; his error in the rule of damages being, we would respectfully point out, that his decision in effect awarded the libellant no damages whatever, but merely restored to him his shipment of sulphur or its value; he taking the view that the invoice value clause in the bill of lading was really an "agreed valuation" clause instead of a mere limitation of liability for damages.

As to the Circuit Court of Appeals' decision, as that Court held the ship to have done wrong in *sailing* from Girgenti on May 8th without the goods, and, therefore, liable to libellant for his loss of market, we have to complain of its ruling that the ship was justified in discharging under the "restraint of princes" clause, only so far as it bases the libellant's liability for the expenses of discharging and storing the brimstone in Girgenti upon that

clause of exemption to the carrier; otherwise, inasmuch as we argue that these charges were in any case, when incurred, incurred purely for the ship's benefit and should be borne entirely by the ship, we are not interested, except as an academic question of law, to dispute the Court of Appeals' view that the master was justified in *discharging* in Girgenti under the circumstances disclosed by the evidence. But as the libellant has been burdened with his share of these heavy expenses, we shall argue that not only could the "restraint of princes" clause have no application to the situation, but that even if it had, the libellant, in view of the efforts of which the master was well aware, to induce Spain to omit sulphur from her contraband list, nevertheless, ought not to bear that burden.

Our points then are:

FIRST:—The ship is bound absolutely to deliver the goods which it shipped and for which it issued its bill of lading, unless relieved by some plain exemption in the bill of lading, or by a strict judicial precedented construction of some exception actually in the bill of lading and excusing performance.

SECOND:—That none of the excusing exceptions in the bill of lading released the ship from her well settled obligation to carry and deliver:

(*a*) There was no "restraint of princes or people," as that clause has been authoritatively construed, which permitted the vessel to discharge the sulphur preparatory to sailing, or to sail without it.

(*b*) The blockade excuse was ridiculous. There was no blockade of the Port of New York, either on paper or *de facto*.

(*c*) The "unsafe to enter the Port of New York" excuse had no foundation in the evidence.

THIRD:—On the facts, and especially as crude brimstone is not contraband *in se*, but *ancipitis usus*, and so contraband by declaration only, the master's conduct in discharging was hasty, inconsiderate and unfaithful, and either grossly negligent or a downright technical conversion, especially without any justification by the reason actually given for it.

FOURTH:—The contract was merely suspended at the most by the supposed risk; it was not discharged; and the master, having unloaded, should have reloaded the cargo on May 7th, when even the supposed risk had disappeared.

FIFTH:—No available stipulation in the bill of lading permits the expenses of discharging, storing and reloading to be saddled on the libellant. It was all for the ship's benefit. There was no "transshipment" within the purview of the bill of lading, and if the discharging should be considered such a transshipment, it should not be at our expense.

SIXTH:—The "invoice value" clause has no application at all to this case.

The "invoice value" clause is not an "agreed valuation" clause, but applies solely to damages as such, to limit them as a final measure.

The Court of Appeals correctly decided the rule of damages and correctly applied the stipulation of August 12th.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE SECOND CIRCUIT.

SCHUYLER L. PARSONS,
Libellant,

AGAINST

THE STEAMSHIP STYRIA, her engines, etc.,
Claimant.

Assignment of Errors.

The libellant herein assigns error in the final decision of the United States District Court for the Southern District of New York herein, as follows:

First. That the Court decreed that the libellant was entitled to recover only the invoice value of the brimstone.

Second. That the libellant was not allowed to recover, as his damages, the value of the goods at the Port of New York, on or about the 5th day of June, 1898, when the Steamship Styria arrived without the goods.

Third. That the libellant was not awarded his full costs and disbursements in this cause because of an offer of judgment made by the claimant.

BOWERS & SANDS,
Proctors for Libellant.

Endorsed: Libellant's assignment of errors, filed Oct. 13, 1899.

FIRST POINT.

The ship is bound absolutely to deliver the goods which it shipped and for which it issued its bill of lading, unless relieved by some plain exemption in the bill of lading, or by a strict judicial precedented construction of some exception actually in the bill of lading and excusing performance.

The Harriman, 9 Wall. p. 162.
Spence *vs.* Chodwick, 10 Q. B., 516.

The liability of the common carrier by law is an unusual one, based upon considerations of public policy which have survived the wonderful changes in the circumstances under which they first arose. By that law the common carrier is regarded as a practical insurer of the goods against all losses of whatever kind, with the exception of (1) those arising from what is known as the act of God; (2) those caused by the public enemy, to which in modern times have been added: (3) those arising from the act of public authority; (4) those arising from the act of the shipper; and (5) those arising from the inherent nature of the goods.

Hutchinson on Carriers, Sec. 170a.

The law making the carrier a practical insurer of the safety of the goods entrusted to him for carriage, except in those cases in which he is exempt under the circumstances now considered, it is settled that whenever the carrier claims that the loss occurred from such causes has entitled him to exemption, the burden of proving the fact rests upon him.

Id. Sec. 185 and Sec. 259a;
3 Kent's Comm. 295 (12 Ed);
Park *vs.* Preston, 108 N. Y., 434;
The Delaware, 14 Wallace, 579.

In the absence of fraud or mistake, the terms of the bill of lading, or its legal effect, cannot be explained, added to or contradicted by parol. It expresses the whole contract.

Id.

Contracts limiting liability must be construed strictly against the carrier.

Hutchinson, Secs. 275, 277.

The burden of proof that the case is one within the exception is upon the carrier.

The Mohler, 21 Wall., 230.

The ship is liable for every loss or injury which might have been prevented by human foresight, skill and prudence.

The Niagara, 21 How., 7.

The question arises whether the appellants are responsible for the miscarriage of their master and agent. Their contract is an absolute one to deliver the cargo safely, the perils * * * excepted. Under such a contract nothing will excuse them from a non-performance, except they have been prevented by some one of those perils, the acts of the libellants or the law of their country. No exception of a private nature, which is not contained in the contract itself can be engrafted upon it by implication as an excuse for non-performance.

Howland *vs.* Greenway, 22 How., 502.

SECOND POINT.

None of the excusing clauses in the bill of lading released the ship from her well settled obligation to carry and deliver.

The bills of lading in this case (pp. 20, 48; fol. 405; p. 185) read as follows, so far as what we believe to be the essential clauses are concerned.

> "Shipped in apparent good order and condition, by , upon the steamship called the Styria, whereof A. G. Scopinich is master for this present voyage and now lying in the Port of Girgenti and bound for New York. . . . (fol. 78). To tow and assist vessels in all situations, although deviating thereby from the voyage, and *to carry goods of all kinds, dangerous or otherwise*, and with liberty to transship any part of the cargo by steamer; . . . to be delivered from the ship's deck, where the ship's responsibility shall cease, . . . at the aforesaid port of New York or so near thereunto as she may safely get, the act of God, the Queen's enemies, pirates, robbers by land or sea, jettison, . . . barratry of master or mariners, restraints of princes and rulers or people, loss or damage resulting from any of the following perils, where arising from the negligence, default, or error in judgment of the pilot or master . . . or other persons in the service of the ship, . . . namely: (then follow a great number of specified risks, none of which bear upon this case) excepted (fol. 81), with liberty (in event of steamer putting back to this or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or transship the goods by any other steamer . . . (fol. 83) and not accountable for loss or damage resulting from stowage, sweating, leakage, breakage, pilferage, wastage, rust, decay, rain, spray frost, thaw, effect of climate or heat of hold, bursting of bags, damage by rats, deterioration in quality, defects, slightness or insufficiency of packages, contact with or smell or evaporation from any other goods, nor for incorrect delivery of goods; . . . (86) all fines, expenses, losses or damage

> which the ship owner or his agents . . . or the ship or cargo may incur or suffer on account of incorrect or insufficient marking of the *packages*, or description of *their* contents, or the dangerous nature of *such contents*, shall be paid by the shipper or consignee, as may be required, and the ship owner shall have a lien upon the goods for the payment thereof. . . . (90) The ship owner is not liable for any damage to any goods which are capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods, nor for claims for damage or detention to goods under through bills of lading, where the damage is done or detention occurs whilst the goods are not in the possession of the ship owner, nor in any case for more than the invoice or declared value of the goods, whichever shall be the least. . . . (93) In case of blockade or interdict of the port of discharge, or if, without such blockade or interdict the master shall consider it unsafe for any reason to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense, and on the goods being placed in charge of any mercantile agent, or of British consul, and a letter being put into the Post Office, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the masters and owners discharged from all responsibility. . . . "

(A) THERE WAS NO "RESTRAINT OF PRINCES OR PEOPLE," AS THAT CLAUSE HAS BEEN AUTHORITATIVELY CONSTRUED BY THIS COURT, WHICH PERMITTED THE VESSEL TO DISCHARGE THE SULPHUR PREPARATORY TO SAILING, OR TO SAIL WITHOUT IT.

When the Styria arrived at Girgenti, she had a small quantity of sulphur already on board (524) and that was all her cargo. This, we suppose, was thrown out with the rest, leaving, so far as the evidence shows, the vessel absolutely empty. While it does appear that the vessel went to Palermo and Messina after sailing from Girgenti, without the cargo, and there loaded a large quantity of green fruit in the room of the sulphur which she had discharged, it does not appear that she was to take this green fruit cargo at the time she shipped

the sulphur (519-520). Wherefore it is manifest, we submit, that the claim that the master was bound to regard the interests of other shippers is without any force, inasmuch as this green fruit cargo was not intended to be carried with the sulphur in any event and was simply shipped in its stead.

Before discussing the adjudications upon this clause, it is necessary to point out that, as stated by Sir Robt. Phillimore, in the case of "The Patria," (L. R. 3 Ad. and Ec. 436), the excuse of "restraint of princes" now put forward and upon which the Court of Appeals held the master justified in discharging the cargo, is a pure afterthought "and devised by the skill of counsel since the suit has been instituted," and cut no figure whatever in the master's mind when he threw the brimstone out.

The best evidence of the master's reasons for discharging the sulphur is to be found in his contemporaneous acts and declarations.

If the Court will look at the postal card sent by the master to the shippers, after he had begun discharging, at fols. 426-427, the real reasons will appear. This letter was sent on the 27th of April, 1898, after the master had begun to discharge without having given the shippers any previous notice of his intention so to do. He says:

"Port Empedocle, 27th of April, 1898.

"On finding risky my passage to New York, with the actual sulphur cargo, for facts of war, I give you notice that I am discharging your cargo for your own account and risk, under care of the mercantile agent, Mr. William Pierce, depositing the same in the warehouses of Mr. Zenobia Urso, and if these are not sufficient, in the warehouses of the British Consulate, faculty which I have in force in the bills of lading.

"With my kindest regards, etc.,

"ANTONIO G. SCOPINICH,
"*Master* Austrian Steamer Styria."

On the same day he sent a letter to the Austrian Consul, reading as follows (431):

> **"Please take notice that by order of the representative of my owners, for facts of war, I am discharging the Austrian Steamer Styria, commanded by me, at expense and risk of whom it might concern," etc.**

(458) When asked on his cross-examination what he meant by his statement that he discharged the cargo to carry out the conditions of the bill of lading, he says, "that means that when the master thinks it unsafe to proceed, and so on; you may read it."

> **"Q. Suppose you show it to me? (*Bill of lading shown witness*). A. (*Witness indicating*). 'In case of blockade.' (*Witness pointing out to this clause in the bill of lading*).**
>
> **"Q. (*Counsel reading*). 'In case of blockade or interdict of the Port of Discharge, or if, without such Blockade or interdict, the master shall consider it unsafe for any reason, to enter or discharge cargo there, he is to have option,' etc.? A. Yes.**
>
> **"Q. You think that under that clause of the bill of lading you had a right to put this sulphur out of the ship at Port Empedocle, do you? A. When the war broke out."**
>
> **(466)**
>
> **"Q. Do you say that Sofio & Co. (*shippers*) protested against your landing this cargo? A. Yes.**
>
> **"Q. And in spite of their protest you landed it? A. Yes.**
>
> **"Q. Under this clause in the bill of lading? A. Yes.**
>
> **"Q. Under the power which you thought was given you in this? A. Yes."**
>
> **(Fol. 515).**
>
> **"Q. Messrs. Baller & Co. also protested, did they not, on the subject—against your discharging? A. Yes; I believe so, you know. Because I handed the protest to the lawyer and didn't take any particulars."**

But apart from the fact that neither the master

nor his owners apparently made any claim to a right to discharge the cargo, except under the clause quoted, we respectfully submit that under the authorities of this Court, whatever any of the State Courts have held or whatever may be held in the British Courts, the condition of affairs in the Mediterranean Sea between the Atlantic Ocean and Sicily, as affecting the master of the Styria, did not constitute restraint of princes, etc. So far as we are aware, but three cases in this Court have passed upon the meaning of the clause. These cases are:

Olivera *vs.* Union Insurance Co., 3 Wheat., 183;

Smith *vs.* Universal Insurance Co., 6 Wheat., 176;

Bradlie *vs.* Maryland Ins. Co., 12 Pet., p. 402.

These cases were insurance cases. But it seems evident that if a clause in a bill of lading issued by the master of a ship, excuses his non-delivery of goods when caused by a restraint of princes, such restraint of princes must be the same as the restraint of princes found in an insurance policy upon the vessel issuing the bill of lading or the goods covered by it. If anything, the clause furnishes less of an excuse for not delivering a shipment in a bill of lading, than it forms a risk insured against in a marine policy. If the goods are not delivered by reason of restraint of princes, it must be the same and no other restraint of princes which will justify an abandonment, and render the insurance company liable for a technical total loss.

G. R. Booth, 171 U. S., p. 459.

See Spinetti *vs.* Atlas Steamship Co., 80 N. Y., 80,

which very plainly indicates that the construction of the words "restraint of princes" in insurance policies and bills of lading is similar.

In the Olivera case a vessel was within the Port of Baltimore about to sail to Havana. Besides the other perils insured against in the policy, according to the usual formula, were "all unlawful arrests, restraints, and detainments of all kings," etc. The cargo and brig were Spanish property. The vessel sailed from Baltimore and was detained by ice till about the 8th day of February, 1813, the policy having been written on the 29th of December previous. The vessel sailing from Baltimore, being near the mouth of the Chesapeake Bay, the master of the brig discovered four frigates, which proved to be a British blockading squadron. He, however, endeavored to proceed to sea. While making this attempt, he was boarded by one of the frigates, the commander of which demanded and received the papers belonging to the vessel, and endorsed on one of them the following words: "I hereby certify that the Bay of Chesapeake and Ports therein, are under a strict and rigorous blockade, and you must return to Baltimore, and upon no account whatever attempt quitting or going out of the said Port." The brig returned; after which the master made his protest and gave notice to the agent of the owners in Baltimore, who abandoned "in due and reasonable time." It appeared also on the trial that the vessel had taken her cargo on board and sailed on her voyage before the blockade was instituted. It was argued on the one hand that, to constitute a technical total loss which would give a right to abandon, it was not necessary that the vessel should expose herself to a physical risk or actual manucaption. It was sufficient that there was a moral impossibility of prosecuting the voyage. It was argued on the other hand that the authorities have settled that mere apprehension is no ground of abandonment; no loss, *quia timet,* is known to the law. Chief Justice Marshall, delivering the opinion of the Court said, amongst other things:

"What, then, according to common understanding, is the meaning of the term 'restraint'? Does it imply that the limitation, restriction or confinement, must be imposed by those who are in possession of the person or thing which is limited, restricted or confined; or is the term satisfied by a restriction, created by the application of external force? If, for example, a town is besieged, and the inhabitants confined within its walls by the besieging army, if in attempting to come out, they are forced back, would it be inaccurate to say that they are restrained within those limits? The Court believes it would not; and if it would not, then with equal propriety may it be said when a port is blockaded, that the vessels within are confined or restrained from coming out. The blockading force is not in possession of the vessels enclosed in the harbor, but it acts upon and restrains them. It is a *vis major*, applied directly and effectually to them, which prevents them from coming out of port. This appears to the Court to be, in correct language, 'a restraint' of the power imposing the blockade, and when a vessel, attempting to come out, is boarded and turned back, this restraining force is practically applied to such vessel.

"Although the word, as usually understood, would seem to comprehend the case, yet this meaning cannot be sustained, if, in policies, it has uniformly received a different construction. The form of this contract has been long settled; and the parties enter into it without a particular consideration of its terms. Consequently, no received construction of those terms ought to be varied."

Speaking of the decisions of this country, the learned Chief Justice said they would be greatly respected were they uniform; but they are in contradiction to each other; that it had been held in New York that a blockade is, and in Massachusetts that it is not a peril within the policy; that the opinions of the Judges of both these Courts were on every account entitled to the highest consideration, but that they opposed each other, and are not given in cases precisely similar to that before the Court.

The learned counsel for the claimant in the case at bar will probably insist, as he has frequently below, that this Court in the Olivera case disapproved of the Massachusetts decisions. Such a view is unfounded. Chief Justice Marshall says, (page 192):

"The opinion that a blockade was not a restraint, was held by the Courts of Massachusetts; but was expressed by the very eminent judge (Parsons, C. J.), who then presided in that court, in a case where the vessel was not confined within a blockaded port by the direct and immediate application of physical force to the vessel herself. Believing this case (that at bar) not to have been expressly decided, the Court has inquired how far it ought to be influenced by its analogy to principles which have been settled."

The Court then cited the case of Hadkinson *vs.* Robinson, 2 Bos. & Pull., 388, where a vessel bound to Naples was carried into a neighboring port by the master, in consequence of information received at sea that the Port of Naples was shut against English vessels. In an action against the underwriters, the jury found a verdict for the defendant, and on motion for a new trial, the Court said:

"A loss of the voyage, to warrant the insured to abandon, must be occasioned by a peril acting upon the subject matter of the insurance immediately, and not circuitously, as in the present case. The detention of the ship at a neutral port, to avoid the danger of entering the port at destination, cannot create a total loss within the policy, because it does not arise from any peril insured against."

Chief Justice Marshall then says:

"It will not be denied that this case applies in principle to the case of a vessel whose voyage is broken up by the act of the master on hearing that his port of destination is blockaded. The peril acts directly on the vessel, not more in the one case than in the other. But if, *in attempting to pass the blockading squadron, the vessel be stopped and turned back, the force is directly applied to her*, and does act directly, and not circuitously.

"Without contesting or admitting the reasonableness of the opinion that the loss of the voyage occasioned by the detention of the ship *by her master* in a neutral port is not within the policy, it may well be denied to follow as a corollary from it, that a vessel confined in port by a blockading squadron, and actually prevented *by that squadron* from coming out, does not sustain the loss of her voyage from the restraint of a foreign power, which is a peril insured against."

The Chief Justice then shows why an embargo is a peril within the policy. There he says the sovereign imposing the embargo is virtually in possession of the vessel, and may therefore be said to arrest and detain her.

But even such an embargo would merely suspend the contract as between the *parties to a bill of lading.* This has been expressly decided in Tonteng *vs.* Hubbard, 3 B. & P., 298, where Ld. Alvanley says:

> . . . "I have no difficulty in subscribing to the doctrine laid down in Hadley *vs.* Clarke that a common embargo does not put an end to any contract between the parties, but is to be considered as a temporary suspension of the contract only and that the parties must submit to whatever inconvenience may arise therefrom, unless they have provided against it by the terms of their contract."

We respectfully submit that the Olivera case decided that the restraint imposed upon the brig was a positive restraint. She was a Spanish vessel, and on the question of whether the restraint was unlawful or otherwise, this Court held that, being a neutral vessel, she was entitled to sail from Baltimore, and that the actual physical restraint took place when she was boarded by the British cruisers and sent back to Baltimore.

We further submit that there is not a word in this case supporting the proposition that a mere fear of restraint, much less a fear of interference, on which the master detains the ship, amounts to a restraint of princes within the meaning of the contract of insurance, permitting abandonment.

In Smith *vs.* The Universal Insurance Co., *supra,* the opinion was written by Mr. Justice Story. That case was on an insurance policy on a voyage of the schooner Tooker from New York to Ports in the Gulf of Mexico, and back to New York, on cargo consisting chiefly of munitions of war, so stated

in the policy. The Tooker sailed from New York in the end of January, 1817. On the 25th of February she arrived at Balize, where the master left the vessel and went to New Orleans, and having obtained information that Nantla and a certain other town were in possession of the Independents, to which places American vessels might proceed, on his return to Balize, the schooner proceeded for Nantla and arrived off that place on the 23rd of March and found it in possession of the Royalists. She then went to the other town and sent a boat ashore, whose crew were made prisoners. Concluding from it that the place was in possession of the Royalists she put to sea, and fell in with a fleet of six sail under the command of General Mina, with troops on board, bound for St. Ander. The master agreed for the sale of his cargo to General Mina, and went with the fleet to St. Ander where the vessel anchored in the open sea, owing to the shoal harbor. While the master was ashore, the Spanish fleet and two armed schooners of the Royalists hove in sight, and the schooner was immediately got under way and escaped. She made several attempts to return, but was prevented by Spanish ships hovering about the place. She finally found the coast clear and returned to St. Ander and took the master on board. The foremast of the schooner being found to be loose, and the crew being short of water, she proceeded to the mouth of the Rio Grande for water and to examine the foremast; and here it was found necessary to take her to Balize for repairs. These having been accomplished, she sailed to St. Ander to deliver the cargo to General Mina, but on arrival there on the 22nd of June, found the place occupied by the Royalists with a military force. In consequence, she did not approach the shore, but proceeded northward about two hundred and seventy miles, where she learned that the whole coast was in complete posses-

sion of the Royalists. The objects of the voyage being in this manner defeated, she returned to New York with her original cargo, when the owners abandoned her to the underwriters, assigning as a cause that she was compelled, by an armed force, to leave St. Ander in the Gulf of Mexico, where she had arrived and was about to deliver her cargo, and was prevented thereafter by a like force from re-entering that place. In the argument the Olivera case was cited as to the meaning of the clause "restraint of princes," and it was argued that the master was prevented by the restraint of princes from entering the port which he had selected within the limits prescribed by the policy; that a reasonable fear of loss by capture, seizure, etc., is a justifiable cause of deviation, and consequently protects against all losses arising from deviation. The contrary was argued on the other side. Mr. Justice Story stated in his opinion that it was argued that there was no actual restraint of princes acting under the authority of Spain whereby the voyage was defeated. He then says:

> "The declaration and the abandonment both tie up the case to a total loss of the voyage, by the restraint of Spanish authorities. If this case be not made out in proof, there is an end of the controversy. In cases of this sort, where a technical total loss is asserted as a ground of recovery, it is not sufficient that the voyage has been entirely frustrated and lost, but the loss must be occasioned by some such peril actually insured against. The peril must act directly, and not circuitously, upon the subject of the insurance. It must be an immediate peril, and the loss the proper consequence of it; and it is not sufficient that the voyage be abandoned, for fear of the operation.
>
> "The plaintiffs rely upon the fact of the Tooker's being chased away from St. Ander, and being prevented for several days from returning to that place by the presence of Spanish armed ships, as decisive proof of actual restraint. But the voyage was delayed only, and not broken up by this occurrence, for the vessel afterwards returned in safety to St. Ander. The insurers do not undertake that the voyage shall be performed without delay, or that the perils in-

sured against shall not occur; they undertake only for losses sustained by those perils; and if any peril does act upon the subject, yet if it be removed before any loss takes place, and the voyage be not thereby broken up, but is or may be resumed, the insured cannot abandon for a total loss. If a vessel be captured during a voyage, and afterwards be recaptured, and performs, or may perform it, there can be no abandonment after the recapture, for a technical total loss. In the present case, the vessel actually did resume her voyage after the restraint ceased; and there is no evidence to show that any object of the voyage was defeated by this temporary restraint and delay to avoid capture. Then, what was the real cause of the final destruction of the voyage? It was that St. Ander, which but for a short time was in the possession of the troops of General Mina, was, in transitu, again occupied by the Royalists, and the colonial Government resumed its functions. A trade was inhibited with that place by the ordinary colonial laws of Spain; and the voyage itself, in which the Tooker was engaged, placed her and her cargo also in the character of an enemy. It was clear, therefore, that a proceeding into St. Ander would have subjected the Tooker to confiscation for a double cause: for breach of the ordinary laws of trade and for a violation of neutral duties. The voyage then was broken up from *fear of loss*, by reason of the seizure and confiscation of the property. It was abandoned by the master *quia timebat*, and not because there was any actual direct restraint which prevented the vessel from proceeding to the port of destination. The case, therefore, falls directly within the authority of the cases of Hadkinson *vs.* Robinson, 3 Bos. and Pull. 388, and Lubbock *vs.* Rowcroft, 5 Esp. R. 50, which have never been shaken. In the former case Lord Alvanley said:

> "'Any loss which necessarily arises from capture or detention of princes, is a loss within the policy; but here the Captain, learning that if he entered the port of destination, the vessel would be liable to confiscation, avoided that port, whereby the object of the voyage is defeated. This does not operate to the total destruction of the thing insured.'

"There are precisely the same circumstances in the case now at bar. . . . If the plaintiffs, in the events which have occurred, were entitled to abandon and recover as for a technical total loss, they would have been entitled to abandon for the same cause at the time of the vessel's sailing from New York on the voyage; for St. Ander was at that time just as much shut against the vessel, and she was just as liable to confiscation for illegal traffic with that place, as she was at the time the voyage was broken up.

"It is the unanimous opinion of the Court that the judgment of the Circuit Court be affirmed, with costs."

"The 'restraints and detainments of all kings, princes or people' are the operation of the sovereign power, by an exercise of the *vis major,* in its sovereign capacity controlling or divesting for the time the dominion or authority of the owner over the ship."

Bradlie *vs.* Maryland Ins. Co., 12 Pet., p. 402.

After a careful examination, we believe Bradlie *vs.* Maryland Ins. Co. is the last declaration of this Court upon this subject, and whether any further argument on the question is necessary or not seems to us to depend upon how far the principle of *stare decisis* affects the minds of this Court.

A great many English cases have been cited by the learned counsel for the claimant. The principal ones bearing on this subject are:

The Express, L. R. 3 Ad. & Ec., 597;
The Teutonia, id. 394; affd. on appeal in L. R., 4 P. C., 171;
The Heinrich, L. R. 3 Ad. & Ec., 424;
The Patria, id., 436;
The Cargo ex Argos, id. 568 and L. R. 5 P. C., 134;
The San Roman, id., 583;
Esposito *vs.* Bowden, 7 Ellis & B., 763;
Nobel's Explosive Co. *vs.* Jenkins, L. R. 1896, 7 Q. B., 326;
Rodoconachi *vs.* Elliott, L. R. 9 C. P., 518;
Geipel *vs.* Smith, L. R. 7 Q. B., 404.

We respectfully urge the Court to examine these cases for itself, and we feel confident that the Court will not find in any of them anything which,

upon due consideration of the facts developed in those cases, will lead it to alter the decisions of this Court; and we further respectfully submit that there is nothing in any of them which justifies the view that the master of the Styria had any right to discharge the sulphur at Girgenti, in view of the circumstances disclosed by the evidence here.

For whatever else may be decided in those cases, the duty of the master as well as the propriety to delay a reasonable time before breaking up or abandoning his voyage, is one of the most persistent and prevalent ideas of the various Courts before whom these English cases came. They are cases where either the master was held justified in the delays which he made while waiting for the situation growing out of the Franco-German War to clear, or where he had actually attempted to carry out his contract and been forcibly restrained, or where goods were actually in transit in the enemy's country and could not be transported, or where, upon the facts as disclosed by the evidence, there was no hope or reason to hope that delay would be of the slightest service to the cargo.

Before proceeding to a discussion of those cases, we would refer to a statement of the obligations of the master and shipper by Mr. Hutchinson in his work on carriers, in Sec. 355. Says he:

> "Obstructions and accidents, however, which will excuse delay in the carriage of the goods, do not put an end to the contract to carry. The utmost indulgence the carrier can claim from them is delay beyond what would otherwise have been a reasonable time for their carriage and delivery to the consignee. As soon as the impediment to their transportation is removed, he must proceed with them and complete the performance of the contract without further delay. In the meantime he must exercise care and diligence in taking care of the goods and may, if it should be necessary for their preservation, unload and store them."
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> Bowman *vs.* Teall, 23 Wend., 306;
> Vicksburg Ry. Co. *vs.* Ragsdale, 46 Miss., 458;

Lowe *vs.* Massachusetts, 12 Ill., 477;
Evans *vs.* Hilton, 5 Scott, N. R., 670;
Hadley *vs.* Clark, 8 T. R., 259.

In The Express (*supra*), the charter-party of a German vessel, entered into at Constantinople between Germans, provided that the vessel should proceed to Taganrog, and there take on cargo to be carried to Queenstown, Falmouth or Plymouth for orders, and thence to a safe port in the United Kingdom, or on the Continent between Havre and Hamburg, or as near thereunto as he could safely get, and deliver the same, the act of God, the Queen's enemies, restraint of princes and rulers, among other perils therein mentioned, excepted. The vessel sailed for Falmouth, and stopped at the Port of Algesiras on August 16th for water. She there learned, as was the fact, that after she had sailed a war broke out between France and Germany, and was still existing. To avoid capture by French cruisers she proceeded to Gibraltar, where she arrived on the 15th of August, 1870, and remained there with her cargo until the 2nd of February, 1871, when, after receiving news of the armistice, she sailed for Falmouth and delivered her cargo, according to orders, in London. While she was at Gilraltar she was requested by the owners of the cargo to proceed, or, if she would not do so, to transship the cargo and forward it at the expense of the ship-owners, but no tender of freight and expenses was made. The war continued until January, 1871, and if the vessel had left Gibraltar during the war, she would have run great risk of capture. She was libelled for the delay. Held, that under the circumstances, the master was justified in proceeding with his ship to Gibraltar and *keeping her there with her cargo on board* during the continuance of the war. Sir Robert Phillimore said that he thought that a reasonable man exer-

cising *due discretion and fortitude* would not have sailed, thereby exposing his ship to capture at that time.

The libellants do not contend that the master of the Styria should have sailed with his cargo on the 25th of April, or at any time prior to the 5th, 6th, 7th or 8th of May, 1898; but we contend that he was not justified *in discharging* the cargo, at all events *at the expense of* the libellants, and that in view of the facts within his knowledge it was his duty in the exercise of discretion to have waited to see the result of the negotiations between Italy and Spain.

In The San Roman (*supra*), a charter party was entered into between an English firm and a Hamburg firm, the owners of a German ship belonging to Hamburg. The charter provided that the vessel should proceed to a foreign port, there load, and thence proceed to a port within certain limits mentioned—the act of God, the Queen's enemies, restraint of princes and rulers, etc., excepted. After making the charter party and after the shipment of the goods, war broke out between France and Germany. The ship on her homeward voyage sustained damage at sea and was compelled to put into a neutral port for necessary repairs, and there finding that French cruisers were in the vicinity, she remained for a long time after the necessary repairs were completed, in order to avoid the risk of capture. The risk of capture was such as to render it reasonable and prudent for the master, having regard to the preservation of his ship, to remain in port. It will be borne in mind that this was a German ship and in danger of capture and condemnation by French cruisers. On the departure of the cruisers, the master sailed on his voyage and delivered the cargo according to orders and according to his contract. The plaintiffs brought suit to recover damages for the delay incurred in order to avoid risk of capture. It was held that the delay was justifiable.

To make that case analogous to the one at bar, the libellants here should be suing the master for the delay in not sailing between the 25th of April and the 8th of May, when he did sail.

We respectfully submit that that is all there is to the case of the San Roman. It was a suit brought because the master, in the exercise of his discretion in a very plain case, stood by his cargo until he could sail in safety. It was not held that the voyage was thereby terminated by the risk of capture or that the master would have been justified in abandoning the goods to the owners or involving them in the great expense of discharge and storage. The libellants here make no question whatever that Master Scopinich was not only entitled, but bound to wait a reasonable time to see the outcome of the negotiations between Italy and Spain as to the carriage of sulphur cargoes. He at least was bound to make some inquiries as to the progress of those negotiations and to have notified his owners thereof; but not a single step in either direction did he take.

To the same effect is the decision on appeal.

The San Roman came before the Privy Council (L. R. 5 P. C., 301), and the judgment was delivered by Sir Montague E. Smith, who said:

> "The only question which their lordships have to determine in this case is whether a German vessel called the San Roman was justified in staying at Valparaiso from the 23rd of September, 1870, up to the 23rd of December in the same year, on account of the alleged risk of capture in consequence of the war which then existed between France and Germany, this being a claim of the English charterers to recover compensation on account of what they allege to be an unreasonable delay. The learned Judge in the Court below has laid down that 'an apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment and experience would justify a delay,' and their lordships are of the opinion that that is a correct statement of the law of England."

It was then said that the Court had merely to determine a question of fact, whether as a matter of fact the German master had such an apprehension founded on circumstances calculated to affect his mind, he being a man of ordinary courage, judgment and experience, as would justify delay, and the Court agreed that there was a sufficient risk of capture to justify it. The learned Judge then wrote:

> "This is not a case where the master has refused to perform the contract at all. No doubt if the voyage had been abandoned then it would have been necessary to show that he had been actually prevented from performing it, but this is merely a question whether there was a reasonable cause for delay."

If the San Roman case contains a correct statement of the law and of the obligations of a master under similar circumstances, and we respectfully submit that it is the law both by the English decisions above cited and by the decisions of our own Courts, then the learned Court of Appeals was very seriously in error when it said in its opinion (p. 344 of the record) that the outbreak of the war justified the master in declining to carry forward the cargo, on the ground that the ship had made no contract to carry contraband of war to the port of belligerent and should not be held to the obligations of a contract into which he had never entered, and especially we complain of the ruling of the Court, as stated on page 345, that they knew "no reason why the master of any vessel of a neutral nation was bound to wait twenty-four hours, or twenty-four days, or twenty-four weeks, to see if the two belligerents would not settle their differences."

Once more the libellant protests that he is not insisting that the master should have sailed on the 25th of April with the brimstone or at any time be-

fore he did sail, but we do insist that he ought not to have discharged the cargo, at least at the expense of the libellant, in view of the facts in this case as already touched upon in our statement of facts, and as we shall more particularly enlarge upon them in the next Point. We respectfully submit that it is the duty of a master to wait twenty-four hours, or twenty-four days, or twenty-four weeks, according to circumstances, if by so doing there is a reasonable chance that the obstacle to his performing the contract will be removed within a reasonable time; and we submit that the learned Judges of the Privy Council were correct in their statement that if the voyage had been abandoned, it would have been necessary to show that the master had been actually prevented from performing it, which is substantially the rule declared by this Court in Smith *vs.* Universal Insurance Company (*supra*).

Certainly not a single one of the cases cited by the Circuit Court of Appeals was a case where the master was held justified in abandoning his contract. As we have already pointed out, most of the cases were cases where the shipper or charterer was attempting to hold the master to an unreasonable interpretation of his contract, and where they had endeavored to force him to sail with his ship, in disregard of his right to exercise a reasonable delay, under the circumstances, in carrying out his contract. The case at bar is really precisely the reverse of such a situation. It is the master here who is endeavoring to have this Court hold that he was justified in abandoning his obligation to delay a reasonable time to see whether the cargo could not be carried, which is all the libellants have desired.

In The Patria (*supra*), a German schooner, owned by Germans was chartered by a German

firm for a voyage from the west coast of Central America to a port on the Continent between Havre and Hamburg, and Bordeaux inclusive, or a port of Great Britain. The charter party was in German, and provided that the master should not be responsible for dangers of the sea, for events caused by high powers or any other event of navigation. The plaintiffs were merchants, carrying on business in London. On April 5, 1870, the schooner sailed on her voyage to Hamburg. Some of the ship's crew becoming dangerously ill, her course was shaped for Falmouth. When near there she heard of the Franco-German war, which had broken out after her date of sailing. She put into Falmouth on the 23d of August, and having obtained assistance continued to remain there until after the institution of the suit on November 7. Before arriving at Falmouth the French fleet had instituted a blockade of Hamburg, which was maintained until September. The raising of the blockade was notified on the 18th of September. The war continued until after the date of the institution of the suit and until after that date armed French cruisers were cruising in the English Channel and North Sea, and German vessels could not sail in those seas beyond the limits of neutral waters, without incurring risk of capture. The plaintiffs heard of the arrival of the schooner at Falmouth soon after she put in and they acquiesced in her remaining there during the blockade, but not after it was raised. During the blockade the plaintiffs offered to take delivery of the coffee at Falmouth and to pay full freight there, and after the raising of the blockade they offered to take delivery of the coffee on the same terms at Falmouth or at Hamburg. Those in charge of the schooner refused to deliver the coffee at Falmouth. It was held that, according to the terms of the bill of lading, the breaking out of the war *did not relieve the*

schooner from her obligations to fulfill the contract; that within a reasonable time after the notification of the raising of the blockade the schooner was bound to proceed on her voyage there, and her neglect to proceed on her voyage after the 18th of September constituted a breach of contract, and that the vessel was not justified in refusing to deliver the goods to the plaintiffs at Falmouth on their offers to pay the freight. But while Sir Robert Phillimore (p. 463) held that after the 18th of September the shipowner was bound, without any further demand, by the terms of his contract, to continue his voyage, he further wrote as follows:

> "I do not mean to say that he was not entitled to a reasonable delay in order to decide as to what was the best course to pursue. What lapse of time may be included in a reasonable delay must depend on the circumstances of each case. In the Teutonia and in the case of Pole *vs.* Cetcovich, the delay was of two or three days. In this case fifty days elapsed before the suit was instituted, a period which I am of opinion exceeded the limits of the time during which the master was entitled to pause, and which constituted the unreasonable delay which was expressly found to be wanting in Pole *vs.* Cetcovich, but which in the case before me made a complete breach of the contract."

In The Heinrich (*supra*), a German ship, under a charter party made at Constantinople, agreed to take cargo at a port in the Sea of Azov and to proceed therewith to a safe port in the United Kingdom or on the Continent, between Havre and Hamburg, calling at Cork, or Falmouth, or Plymouth for orders, and deliver the cargo, the act of God, the Queen's enemies, restraint of princes and rulers, etc., excepted. In pursuance thereof a vessel went to Berdiansk and took on a cargo of wheat. The vessel sailed from that port and put into Falmouth on the 8th of August, but received no orders until the 3rd of September, when she proceeded to

Leith by orders. After the making of the charter party and the signing of the bill of lading, war broke out between France and Germany, and continued until after the vessel was arrested in this suit. From the time that the master received orders to proceed to Leith until after the attachment of the vessel, armed French cruisers were cruising in the Channel and North Sea, and German vessels could not sail beyond the limits of neutral waters, without incurring risk of capture. When the master received orders to proceed to Leith, and on other occasions after that time and before the attachment, he expressed his willingness to sail for Leith the first favorable opportunity, and kept the vessel waiting there for a leading wind which would enable her to make a good passage and give her a fair chance of escaping the French cruisers. On September 15th the plaintiffs instituted a suit against the vessel, alleging as the cause of action the master's neglect to proceed to Leith. On the 21st she was arrested. It was held that the delay of the master under the circumstances was justifiable. Before the orders to sail for Leith were given and afterwards, negotiations were continually going on between the plaintiffs and the master for the delivery of the cargo at Falmouth at reduced freight, but no terms were agreed upon. Semble, these negotiations modified the order to proceed to Leith and afforded a reasonable excuse for the master to remain at Falmouth, where they were being carried on. It was held, as above stated, that these facts justified the master's delay; as, of course, was clear. He did not discharge the cargo and claim to have a right to throw up his contract. It was held, on the contrary, that it was not only his right, but his duty, to delay a reasonable time, and it was held that he did not delay an unreasonable time, "looking to all the circumstances of the case." Further-

more, in that case, it is true, the negotiations were between the master and the consignees as to relieving the vessel from the obligation. Furthermore here was a plain case of the action of the Queen's enemies, meaning the enemies of the sovereign of the shipowners, to wit, the French.

In The Teutonia (*supra*), which was a Prussian brig, under charter party to load nitrate of soda from South America to any safe port in Great Britain or on the Continent between Havre and Hamburg, the vessel sailed with nitrate, as agreed, having issued a bill of lading for the nitrate, excepting the act of God, Queen's enemies, fire and other dangers of navigation. At the time of the making of the charter party until after the sailing of the ship, Prussia was at peace. On July 12 she arrived at Falmouth. The next day she received orders to go to Dunkirk. She sailed for Dunkirk, arriving off there on the 16th, but the tide forbade her entering. While off that port on the 16th she was boarded by a pilot, who told the master that war had broken out between France and Prussia. She then returned to the Downs and anchored there on the 17th, which was Sunday. On the 18th the master telegraphed for instructions, and the owner told her not to go to Dunkirk. On the 19th she put into Dover and there remained. It was proved that on the 15th of July the French Government had made a formal declaration that the King of Prussia had notified the French Ambassador that he would not be received, but no formal declaration of war was delivered until the 19th. Held, that the master was entitled under the circumstances to pause before entering Dunkirk, and *to take a reasonable time* for making inquiries, and that he was not guilty of any breach of duty or breach of contract. The plaintiffs on the 19th of July demanded the delivery of the nitrate at Dover, but

made no definite offer to pay *pro rata* freight and the master refused to deliver, and it was held that he was justified; that he was not bound to deliver without compensation. It will be borne in mind that here was a German ship in danger of capture by the "Queen's enemies." Sir Robert Phillimore said, referring to Atkinson *vs.* Ritchie, 10 East, 530:

> "This was a case in which the impediment to the fulfillment of the contract was the apprehension of an embargo, the future of which is always doubtful, and to which considerations apply other than those which apply to a state of actual war, the end of which cannot be foreseen; whereas an ordinary embargo imposes only a temporary restraint upon the performance of the contract. An embargo is an act, as Lord Stowell says, hostile enough in the mere execution, but equivocal as to its effects, and liable to be varied by subsequent events, and by the conduct of the government, the property of whose subjects is so detained."

(p. 414):

> "In the case before me the law of France, the state to which the port belonged, did not, it is true, prevent the unloading at Dunkirk; but the law of Prussia, the state to which the ship belonged, prevented it. The contract was no longer capable of being performed by the master 'without' (to use the phrase of Lord Ellenborough) 'a criminal compromise of public duty'; for I think it might be reasonably maintained that the prohibition was as stringent in the one case as the other (referring to Atkinson *vs.* Ritchie), and that the same legal consequences flow from either state of things. I think that on the 16th of July the Teutonia could not have entered Dunkirk with her cargo without *being exposed to the penalties of trading with the enemies of her country.* But if this be an erroneous application of the law to the facts at this date, the next question which arises is whether the circumstances did not justify her in *pausing and making further inquiries* before she entered the port. I am of opinion that they did justify her in so doing, and that she was entitled to take reasonable measures within a reasonable time for this purpose."

We respectfully submit that this duty and privilege are reciprocal, and that the right of the master to discharge the cargo, under any and all circum-

stances, in the port of lading, without waiting a reasonable time, is no greater than the right of the shippers to demand that he wait a reasonable time and take reasonable measures to find out whether or not he can safely proceed with the cargo within a reasonable time.

Again, says Sir Robert Phillimore (p. 415):

> "I am of opinion that the master of the Teutonia was entitled to pause and take a reasonable time for making further inquiries as to the existing relations between his own country and France, and that he did not exceed the limits of a reasonable time in making the inquiry; and after the inquiry had been made, it is admitted that the contract could not, on account of the war, be executed."

The Teutonia came up on appeal in Privy Council, and that appeal is reported in L. R. 4 P. C., 171. The judgment was pronounced by Lord Justice Mellish, who amongst other things recited the following facts: That when the vessel arrived off Dunkirk the pilot came on board; "that the master asked the pilot about the war; that the pilot told him it had been declared two days ago; that he asked the pilot where he could bring to in safety, so that he might ascertain whether war was actually declared or not; that the pilot offered to take him to Flushing or the Downs or wherever he liked. The master elected to go to the Downs, and he anchored there on Sunday morning, the 17th, at ten o'clock. He says that on that day he could obtain no advice or information; that on Monday, the 18th, he was on shore at Deal, and the German Consul told him that war had broken out. He telegraphed to the owner, who was his father, and received an answer forbidding him to go to Dunkirk," and he then took the ship into Dover.

After reciting that the Court below had held that the Teutonia could not have entered the port of Dunkirk with her cargo on the 16th, without being exposed to the penalties of trading with the enemy

of her country, the Appellate Court say (p. 178):

> "Their lordships have great difficulty in agreeing with the learned Judge that the Teutonia could not have entered Dunkirk, without being exposed to the penalties of trading with the enemy of its country, on the 16th of July. . . .
>
> "And though it is true, as stated by the learned Judge, that war may exist *de facto* without a declaration of war, yet it appears to their lordships that this can only be effected by an actual commencement of hostilities, which in this case is not alleged."

The Court held, however, that a further consideration of that part of the case was unnecessary, because they agreed with the Judge below that the master of the Teutonia, when he was informed on his arrival off Dunkirk by the pilot, although incorrectly,

> "That war had been actually declared two days before, was entitled to pause and take a reasonable time to make further inquiries, and that he did not exceed the limits of a reasonable time in making inquiries. . . . It seems obvious that if a master receives credible information that if he continues in the direct course of his voyage his ship will be exposed to some imminent peril, as for instance that there are pirates in his course, or icebergs or other dangers of navigation, he must be justified in pausing and deviating from the direct course and taking any step which a prudent man would take for the purpose of avoiding the danger."

The Court then considers the argument made that the master was not excused from carrying the cargo into Dunkirk merely because the vessel was a German ship, and therefore liable to condemnation, inasmuch as the cargo, being neutral cargo, would suffer no harm from being carried into the French port, and that inasmuch as there was no actual danger on the 16th, when the ship was first off Dunkirk, he was not prevented by one of the excepted perils; and it ruled that it could not be

expected that the master would act in any respect differently towards an English cargo than he would towards one shipped by one of his own country, and that he was not deprived of the right of taking reasonable and prudent steps for the preservation of his ship because from the accident of the cargo not belonging to his nation the cargo is not exposed to the same danger as the ship.

In other words, it is apparent that their lordships had well settled in their minds that it was the duty of the master to have regard, not only to the conditions of his ship, but of his cargo, and that it was his duty in regard to each to take every reasonable step and use all reasonable time in endeavoring to perform his contract, and to stand by his obligations to it.

As to the contention that when once the consignee has named a port, which is an open and proper port at the time he names it, that that was the only port of discharge to be considered, and that having refused to enter Dunkirk the contract had been broken by the master, and that therefore the plaintiffs were at liberty to reclaim their cargo at Dover without the payment of freight, the Court say (p. 182):

> "There is no authority on the proper construction of the charter party in this respect; but their lordships are of opinion that they ought not to hold that the contract between the parties has become impossible of performance and is therefore to be treated as dissolved, if by any reasonable construction it can be treated as still capable in substance of being performed. . . . A mercantile contract, which is usually expressed shortly and leaves much to be understood, ought to be construed fairly and liberally for the purpose of carrying out the object of the parties."

In Geipel *vs.* Smith, the British ship Martindale was chartered to take a cargo of coal to Hamburg and there deliver it, the act of God, Queen's

enemies, restraint of princes and rulers, etc., excepted. The plaintiffs alleged that they did and were ready to do all that was necessary on their part, but that the defendant, before any breach by the plaintiffs of the charter party, refused to carry it out or to let their ship take any goods to Hamburg, and gave notice to the plaintiffs that they renounced the charter party. For the defendant the fifth plea was that, before any breach of the charter party, war broke out between France and Germany; that Hamburg was blockaded by the French fleet; that the Queen, by proclamation, enjoined her subjects to a strict neutrality and not to violate the law of nations; that the defendants were British subjects and their ship a British ship, and the cargo being a cargo to be carried to Hamburg, the further performance of the charter party became illegal, and the defendants, as they lawfully might, refused to carry it out. The sixth plea was, repeating the above allegations, that defendants having notice of the premises, refused to allow the ship to receive the cargo for the purpose of running the blockade and delivering the cargo, which was the breach complained of. The seventh plea was, repeating the same allegations, that they were ready to carry out the contract, except so far as prevented by any of the excepted clauses, but that the charter party could not have been carried out within a reasonable time, except by running the blockade.

It will be noticed that here the contract was purely executory and performance had not been entered upon, and it was held that the defendants were justified in throwing up the contract and refusing to load the ship when the further performance of the contract *within a reasonable time* was prevented by an excepted clause, viz., the blockade, which was a restraint of princes. Chief Justice Cockburn said that as they could not carry out

their contract because of the blockade, that they were excused from taking the initial step, and that the terms of the contract justified this course. He held that an actual blockade was a restraint of princes.

> "But, then it is said, that the exception must be taken to apply to the whole contract, and that inasmuch as the defendants were bound to sail as soon as wind and weather would permit, that must mean if there be no such restraint, and if there be then as soon as wind and weather permit after the restraint is removed. But it would be monstrous to say that in such a case the parties must wait—*for the obligation must be mutual*—until the restraint be taken off—the shipper with cargo which might be perishable or its market value destroyed—the ship owner with his ship lying idle, possibly rotting, the result of which might be to make the contract ruinous. *At all events it must be taken that the restraint must cease within a reasonable time and that the duty of the defendants was to wait only a reasonable time prepared to carry out their contract should the restraint be removed; but the defendants based their defense on the ground that it was here impossible to expect, from the nature of the circumstances, that the obstacle of the blockade would be removed within a reasonable time. It is a sufficient answer on the defendant's part that it was not likely to be removed within a reasonable time, and assuming that either party was bound to wait a reasonable time to ascertain whether the obstacle would be removed, in point of fact it was not so removed, and the defendants were therefore justified in not attempting to perform their contract.*"

Here again we find that the moral running through the decision is that in circumstances like those disclosed, it is the reciprocal duty of the parties to wait a reasonable time and to make reasonable efforts to discover whether the contract can be performed within a reasonable time, and the pith of the decision is that it was apparent in that case that there was no reasonable expectation in sight that the blockade of Hamburg would be removed within a reasonable time. In fact, there was not a word of evidence to suggest the hope that such a thing would happen, thereby radically

differing from the case at bar, and therefore the Queen's Bench held that the master was not bound to wait. As we have already pointed out, the contract in Geipel *vs.* Smith was purely executory, and as nothing occurred to suggest the possibility of performance within a reasonable time, the Court held that the master was not obliged to take even the initial step of loading, because the contract was entire; but we submit that there is a broad difference between not entering upon the initial step towards the performance of an executory contract and a high-handed violation of a contract, performance of which has already been entered upon; and we submit that it is also apparent from the opinion of Chief Justice Cockburn that, had there been any evidence in the case for a reasonable ground to believe that the blockade would be removed within a reasonable time, it might have been the duty of the master to have taken the initial step of loading the coal.

So also Blackburn, *J.*, said (p. 412), after reciting the facts:

> "I take the effect of such a state of things as an effective blockade of the port of discharge is not merely to excuse delay in the carrying out of the contract, but that, after a reasonable time, it relieves the parties, the contract being altogether executory, from the performance of it. The case of Touteng *vs.* Hubbard, 3 B. & P., at p. 298, if I do not misunderstand it, went to this extent. There there was a charter party of a Swedish ship to proceed to St. Michaels and there load a cargo of fruit, with the usual exception of restraint of princes. An English embargo was put on Swedish vessels and the ship was prevented sailing during the fruit season. The ship-owner offered to proceed on the voyage as soon as the embargo was taken off, but the charterer declined the offer, upon which the ship-owner sued for loss of freight. The Court, however, held that he could not recover, saying that *the exception of restraint of princes was in favor of the ship-owner*, but that could not be carried to the extent of saying that the charterer is bound to carry out the contract by supplying a cargo after the fruit season is over. . . . Here there was an executory contract and the ob-

ject both parties had in view depended very greatly on time. . . . The object of each of them was the carrying out of a commercial speculation within a reasonable time, and if restraint of princes intervened and lasted so long as to make this impossible, each had a right to say, 'our contract cannot be carried out,' and therefore the ship-owner had a right to sail away and the charterer to sell his cargo or refrain from procuring one and treat the contract as at an end. . . . On the seventh plea it must be taken that the blockade lasted beyond a reasonable time. . . . But then it is said it is possible the blockade might be raised within a resonable time. No doubt it was possible. *But it must be taken on this record that it was not raised within a reasonable time. So if the defendants chose to run the risk and in the event turn out right, they are in the same position as if they had waited the reasonable time and had then sailed away. Possibly had they turned out wrong, the plaintiffs would have been entitled to say, 'we were ready and willing to put a cargo on board; you chose to take your chance and have turned out wrong; therefore we have a cause of action against you.'* But the defendants here were right, and there never was a time when the plaintiff could say 'we are ready and willing and able to perform our contract.' Very different considerations arise where the cargo is already on board, or as in Hadley *vs.* Clarke, 8 T. R., 259, or on the voyage before the obstacle intervenes; but whilst the contract still remains altogether executory, I think time is so far of the essence of the contract as that matter provided against which arises to cause unavoidable but unreasonable delay is sufficient excuse for refusing to perform."

In the case of Rodoconachi *vs.* Elliott (*supra*), marine insurance had been effected on goods on a voyage from Shanghai to Marseilles and London via Marseilles and Southampton. The risks insured against were amongst others of the seas, etc., restraints and detainments of all kings, princes and people. In the margin of the policy was a memorandum that the silks insured should be shipped by certain named companies and steamers, and the practice of one of the companies was to send such goods overland through France by the Lyons Railway from Marseilles and Paris, and thence by the Northern Railway to Boulogne, and thence to

London, and this course of business was well known. The goods arrived in Paris on their way on the *13th of September, 1870.* At this time the German armies were advancing on Paris, and had seized parts of the Northern Railway, so that the goods could not be forwarded to Boulogne, and by the 19th of September they completely surrounded and besieged ports, preventing communication between it and all other places, by reason of which it was impossible to remove the goods from Paris. This state of things continued until after the *7th of October,* on which day the assured gave notice of abandonment. It was held that there was a constructive total loss by restraint or detainment of princes within the meaning of the policy.

The libellants here do not question for a moment the propriety of that decision. The difference between a case of the exception of "restraint of princes" in an insurance policy and in a bill of lading is this, that when you find the restraint of princes to be effective, the insured is not obliged to wait until the Insurance Company learns whether the voyage can be completed within a reasonable time. If the actual restraint becomes effective, the insured may at once abandon to the insurer; whereas in the case of a bill of lading it is the common duty of both shipper and master to wait a reasonable time and to make reasonable efforts to discover whether the contract cannot be performed within a reasonable time, if there is a reasonable expectation of the restraint being removed.

And this proposition is well supported, we think, by the words of Bramwell, B., in the case just cited. He says (p. 522):

> "It was not said that the goods could not have been sent to Havre or other ports, but we think this immaterial, for supposing they could and ought to have been, but were not, and supposing that in this the *carriers were guilty of*

> a *breach of duty*, that would not make the loss the less a loss to the assured;"

and after showing that nevertheless the German armies prevented all communication between Paris and all other places, rendering it impossible to remove the silks from Paris, he says (p. 522):

> "The result of this state of things undoubtedly was that the goods were prevented from leaving Paris and the whole adventure was broken up and so continued at the time the notice of abandonment was given and up to the commencement of the action. . . . This is not a mere temporary retardation of the voyage, but the breaking up of the whole adventure."

The case of Esposito *vs.* Bowden, 7 Ellis & B., 762, was a case where a British ship was chartered to go to Odessa for a cargo during the Crimean War. The pendency of the war was set up as a defense for not loading the cargo and it was held by the Court of Exchequer Chamber, reversing the Queen's Bench, that this plea was good as showing a dissolution of the contract before the time of performance had expired, as the shipment of a cargo from an enemy's port, even in a neutral vessel, was an act forbidden by law to a British subject, and the citations from the American authorities,

> 3 Kent's Comm. 248;
> Griswold *vs.* Waddington, 16 Johns 438;
> The St. Lawrence, 1 Gallison, 467;
> The Joseph, id. 545;

were all cases to that effect.

The case of Nobel's Explosive Co. *vs.* Jenkins, L. R. (1896) 2 Q. B. 326, is a case which the claimant has deemed very much in his favor, although it merely holds that the circumstances there disclosed amounted to a restraint of princes within

the meaning of the bill of lading; but we trust we have made it plain that we are not attempting to dispute the proposition that the Styria was justified in not sailing from Girgenti on the 25th of April, when she had completed her loading, but that our contention is that she was not justified in immediately discharging the cargo, in view of the successful efforts, of which the master was well aware, which Italy was making to induce Spain to permit Italian sulphur to pass unmolested. The Nobels case fully sustains what we have all along held to be the moral of all the decisions which we have cited to the effect that it is the reciprocal duty of the master and shipper to take a reasonable time and make reasonable efforts to carry out their obligations, if there is reasonable ground to believe that it can be done within a reasonable time. In the Nobels case a British vessel loaded with dynamite contracted in a bill of lading to carry the dynamite from London, to be delivered "at Yokohama or as near thereunto as she may safely get." The bill of lading contained the usual exception of restraint of princes, rulers and people, and it also had in a clause similar to one which is found in the bill of lading at bar, as follows: "In case of the blockade or interdict of the port of discharge, or if the entry or discharging in the port shall be considered by the master unsafe by reason of war or disturbances, the master may land the goods at the nearest safe and convenient port, at the expense and risk of the owners." The vessel arrived at Hong Kong on August 1 with the dynamite, and in obedience to the regulations of that port with respect to ships carrying explosives, she anchored off the Government magazines and flew a red flag, thereby publicly announcing the fact that she had contraband of war on board. On the same day war was declared between China and Japan. The master cabled his owners for instruc-

tions, and on the following day they ordered the dynamite to be discharged. It was accordingly landed at the Government magazines at Hong Kong, and on the 4th of August the ship sailed with the rest of the cargo for Yokohama, where she arrived in due course. In December the plaintiffs forwarded the dynamite by another steamer from Hong Kong to Japan, and then brought the action to recover the amount of freight that they had had to pay for forwarding to Hong Kong and other expenses they were put to in connection with the landing and reshipping there. It was proved that there were in the Port of Hong Kong numerous revenue cutters of the Chinese Government, and in sight of where she lay were two Chinese war vessels. Hong Kong is near the naval station of the Southern Chinese Squadron, and there were other war vessels about the port. The fact that the vessel had explosives on board was generally known.

As we do not for a moment contend that under such circumstances there was not a very powerful restraint of princes, we shall merely state in regard to that that the Court held that "the goods would have been confiscated, and it was quite uncertain what course the captors would take with the ship and the rest of the cargo. * * * The goods were as effectually stopped at Hong Kong as if there had been an express order from the Chinese Government that contraband of war should be landed." But it is at this point that we find again a full recognition of the moral for which we have contended all along in this Point. The learned Judge then says (p. 331):

> "The restraint was not temporary, as was contended by the plaintiff's counsel. *There was no reason to expect that the obstacle in the way of the vessel could be removed in any reasonable time.*"

And on page 332 the Court says again:

> "Apart from the terms of the bill of lading, it seems to me that the conduct of the master would be justified by reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. *Whether he has discharged that duty must depend upon the circumstances of each case.*"

The proposition which has been advanced by the claimant, that where it was the duty of a shipper not to ship unlawful or contraband goods, is not disputed; but the proposition is only true as to contraband goods where they are clandestinely shipped. Chancellor Kent (3 Kent's Comm., 302, 12th Ed.) says:

> "If the freighter puts on board prohibited or contraband goods by means whereof the ship is subjected to detention and forfeiture, he must answer to the ship-owner for the consequence of the act";

and he cites Smith *vs.* Elder, 3 Johns. 105.

An examination of that case shows that the goods were put on clandestinely, and, indeed, fraudulently and under a falsehood, and the ruling is distinctly with that fact in view. The note to the above quotation says:

> "The shipper of goods on a general ship is held to undertake that he will not deliver, to be carried on the voyage, packages of goods of a dangerous nature, which those employed on behalf of the ship-owner may not, *on inspection*, be reasonably expected to know to be such, without expressly giving notice that they are of a dangerous nature, even when he is ignorant of the fact and without actual fault."

But here the carrier expressly undertook to carry all kinds of goods, dangerous and otherwise.

THIRD POINT.

On the facts, and especially as crude brimstone is not contraband IN SE but ANCIPITIS USUS and contraband by declaration only, the master's conduct in discharging was hasty, inconsiderate and unfaithful, and either grossly negligent or a downright technical conversion, especially without any justification by the reason actually given for it.

In the preceding Point we have attempted to show that it was the master's duty, under all circumstances, to exercise reasonable care and to delay a reasonable time to see whether he could not perform his contract and complete his voyage and also we think we have shown that, if he intended *quo ad* the cargo to abandon the voyage, then it would have been necessary for him to show that he had been actually prevented from performing it; and we have adverted from time to time to the circumstances of this case which particularly rendered it incumbent upon the master to have waited a reasonable time to see if he could not profit by the efforts then being made by the Italian Government to induce Spain to omit sulphur from its list of contraband goods.

Assuming for the moment that all kinds of sulphur, refined sulphur, or crude brimstone, which was the actual cargo involved in this suit, were always and at all times universally admitted by international law to be contraband, yet even then, in view of these well-known efforts of the Italian Government, it was the duty of the master to have

waited a reasonable time to watch for the result of these negotiations.

But we shall show, we think, in this Point, that not only is refined sulphur not universally admitted in international law to be contraband *in se*, but only so when declared by one of the belligerents, but that as a matter of fact the cargo actually in question in this case not being refined sulphur, but crude brimstone, was not contraband under the most stringent views of the decisions and text books upon the subject. We shall also argue that especially in view of its doubtful character as contraband under any circumstances, whether as refined sulphur or as crude brimstone or sulphur, it was the duty of the master to learn whether or not Spain intended to put it on her list of contraband articles, and whether, if so, she would or would not make a special exception in the case of Sicilian sulphur. Thus there were two reasons why the master was bound to have taken a reasonable delay before discharging or sailing. What the master actually did, however, was to settle for himself what is at least a mooted question amongst international law writers, notwithstanding that he received the commendation of the Circuit Court of Appeals, where it says (p. 345):

> "As soon as he learned that war was declared, the master knew that the cargo he had taken on board was contraband. 'I knew, says he, that sulphur is to make gunpowder. Everybody knows that. . . . I thought it must be contraband.' We should have some doubts as to the efficiency of a master for international commerce who did not know that sulphur was contraband of war."

Let us see. The Treaty in existence between Spain and the United States, which was negotiated in 1795, was in full force and effect down to the 25th day of April, 1898.

In the Royal decree of the Queen Regent (page 217 of the record), that lady says:

"In accordance with the advice of my counsel of ministers, in the name of my son King Alphonso XIII., and as Queen Regent of the Kingdom, I decree as follows:

"Art. I. The state of war existing between Spain and the United States terminates the Treaty of Peace and Friendship of the 28th October, 1785, the Protocol of the 17th of January, 1877, and all other agreements, compacts and conventions that have been in force up to the present between the two countries."

Whether or not that Treaty would be abrogated by either of the contracting parties was, of course, a matter which nobody could prophesy at the time. The mere existence of a state of war between the parties did not, as of course, abrogate the Treaty, particularly the clause of the Treaty which was especially negotiated with a view to the existence of war between the parties.

Wharton, Int. Law Dig., 2nd Ed., Vol. 2, p. 44, 45;
1 Halleck, (Baker's Ed.), 242;

specially referring to stipulations as to "contraband."

Therefore the learned master of the Styria could not even tell, upon the mere outbreak of war, whether or not this Treaty would be abrogated.

By Section 16 of this Treaty of 1795, contraband is at great length defined. This article both expressly defines what is contraband and also expressly excludes in specific and general terms articles which are not contraband. Amongst the articles included as contraband is saltpetre; but sulphur is not mentioned.

Then follows a large number of articles expressly excluded, and then, "and all other goods whatever which have not been worked into the form of any instrument prepared for war by land or sea shall not be reputed contraband: * * * all which shall be wholly reckoned as free goods."

The Treaty of 1819 expressly confirms the Treaty of 1795, with the exception of certain Articles remodeled by the latter Treaty which have no bearing upon the matters in suit.

So that had the master taken advice, he would have learned that as things stood between Spain and the United States, upon the Treaty, which so far as he knew was still in existence, not only was sulphur, and especially crude brimstone not contraband, but that it came plainly within the category of goods which had not been worked into the form of any instrument prepared for war by land or sea, and that, therefore, both refined sulphur and crude brimstone should be "wholly reckoned as free goods." We have already adverted to the fact that there is no evidence that the master had any actual knowledge of the Queen Regent's decree until it was promulgated in Italy by the Minister of Agriculture and Commerce, along with the fact that the Spanish ships of war had been instructed not to molest Italian sulphur.

So that the negotiations of which the master was well aware, and which he said caused him to believe that sulphur was contraband, (because he says he knew that efforts were being made to have it go free), were really not to cut sulphur out of the class of articles contraband *per se,* but really to induce Spain not to include them in a list of contraband articles.

> "It was the duty of the master to acquaint himself with the laws of the country with which he was trading and to conform his conduct to those laws. He cannot defend himself under asserted ignorance, or erroneous information on the subject. . . . "
>
> Howland *vs.* Greenway, 22 How., p. 502.

Yet if ever there was a case where a little knowledge, and especially a little knowledge of the law, was a dangerous thing, this case is an example of it.

An examination of the text writers seems to show that sulphur has not been by any means generally recognized as contraband of war *per se*. We shall not take up time and space to quote at length from them.

> "The catalogue of contraband has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations."
>
> By Sir W. Scott in The Jonge Margaretha, 1 C. Rob., 192.

We refer the learned Court to Halleck's International Law, Chap. 24, on Contraband of War:

T. L. Lawrence on Principles of International Law, Chap. VI;

Hall's International Law, Part IV, Chap. 5, on Contraband; and

Declaration of War, by Douglas Owen, page 159.

From these we gather that the English writers and the British Government have advocated and stood for a very extensive view as to what is contraband, but that the continental writers have taken a stricter view of the subject.

Halleck in Sec. 15 of the foregoing Chapter says that Wheaton is evidently disposed to exclude entirely from the list of contraband provisions and other articles of promiscuous use. Kent and Duer, he says, are of the opinion that such articles may or may not be contraband, according to the circumstances of the case, depending upon their preparedness for warlike uses, upon whether they are or are not articles in common commercial use and upon their particular destination. Halleck says, Sec. 17, Chap. 24:

> "The numerous treaties to which the United States have been parties and which contain many stipulations respecting contraband, with the single exception of the Treaty

with England of 1794, confine the term to arms and munitions of war, and in the early ones naval stores are in express terms excluded from the list and in none of them is sulphur mentioned."

In Section 20 Halleck says that it is universally admitted that all instruments and munitions of war are to be deemed contraband; that the rule embraces by its terms a fair construction of ordnance and arms of every description, balls, shell, shot, gunpowder, etc., and to the list he says "is to be added all articles, manufactured or unmanufactured, which are almost exclusively used for military purposes or intended for manufacturing arms, and saltpetre, and sulphur for making gunpowder."

By this, of course, is meant a certain kind of refined sulphur which is available for making gunpowder, because, as we shall point out, it is only a certain sort of refined sulphur that is available for that purpose.

In Section 22 Halleck says that articles in a rough state which may or may not be used for military and naval purposes may or may not be contraband, according to their nature and destined use as inferred from their immediate destination.

In Section 23 Halleck says that the probable use is inferred from their known destination, and he quotes Kent, who makes a distinction between ordinary commercial ports, where the presumption is that they were intended for civil use, and ports like Brest or Portsmouth, which are distinctively naval or military ports. This presumption, he adds, should be admitted for their protection.

Hall, in the Chapter above quoted, discusses the question at length and shows that it is an open question amongst international writers.

In an interesting work by Douglas Owen above cited, the title of which is Declaration of War, at page 159 we find:

"The belligerent has the right to impose a qualified blockade of another kind, by which it is forbidden to neutrals to carry to the enemy any goods in the nature of warlike supplies. This is a prohibitive right so well known and understood that it goes without saying, and although it may be suitable and proper that on the outbreak of hostilities bellligerents should declare what are the supplies which they intend to regard as unlawful and contraband, the circumstance that no such list has been published cannot be averred by neutrals as a justification for the shipment of munitions of war to a country known to be engaged in hostilities. The public declaration of war or the actual outbreak of hostilities is regarded as *de facto* notice to all the world that warlike supplies sent to either of the belligerents will be looked upon by the other as contraband. As regards supplies distinctly warlike, there can be no doubt as to their unlawfulness without special declaration of the fact.

"But there are goods of equivocal use—goods *ancipitis usus* as they are technically termed—which are not necessarily contraband and become so if so considered by a belligerent."

And on page 165 he says:

"The Treaty of Commerce of 1796 between Great Britain and the United States sets forth that under the denomination 'contraband of war' should be considered all arms and implements serving for the purpose of war by land or by sea and mentions by name, as examples, various arms, accoutrements and warlike implements, including horse furniture and saltpetre. Sulphur is not specially mentioned, and it could, perhaps, scarcely be regarded as within the general head of arms and implements serving for the purposes of war."

Coming finally to the law of this Court, we have it best set forth in the cases of The Peterhoff, 5 Wallace 28.

In The Peterhoff, the Chief Justice delivered the unanimous opinion of the Court, and on page 58 says:

"This brings us to the question: Was any portion of the cargo of The Peterhoff contraband? The classification of goods as contraband or not contraband, has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable;

but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes:

"The first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war;

"The second of articles which may be and are used for purposes of peace or war according to circumstances;

"And the third of articles exclusively used for peaceful purposes.

"(Lawrence Wheaton, 772-6, Note; Commercen, 1 Wheaton, 382; Dana's Wheaton, 629, Note; Parsons' Mar. Law, 93-4).

"Merchandise of the first class destined to a belligerent country or places occupied by the army or navy of a belligerent is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege."

And speaking of the actual goods comprising the cargo of The Peterhoff, the Court says:

"A considerable portion of the cargo of the Peterhoff was of the third class, and need not be further referred to. A large portion, perhaps, was of the second class, but is not proved, as we think, to have been actually destined to belligerent use, and cannot therefore be treated as contraband. Another portion was in our judgment, of the first class, or, if of the second, destined directly to the rebel military service. This portion of the cargo consisted of cases of artillery harness, and of articles described in the invoices as 'Men's army bluchers,' 'artillery boots,' and 'government regulation gray blankets.' These goods come fairly under the description of goods primarily and ordinarily used for military purposes in time of war."

We take it, that the first class is of the kind called by the text writers contraband *in se,* and the second class is *ancipitis usus,* which is not necessarily contraband, but become so if so considered by belligerents as being directly destined to the military service of the belligerent.

We respectfully submit, that it is impossible to

consider crude brimstone as within the first class of contraband, to wit, articles manufactured and primarily and ordinarily used for military purposes in time of war.

Crude sulphur or brimstone (*i. e.* burn-stone) is not manufactured sulphur or refined sulphur; crude brimstone or sulphur is not primarily used for military purposes even in time of war.

By reference to Encyclopædia Britannica, Vol. 22, title Sulphur, page 635, we find the following:

> "During the year 1875, the production of sulphur in Europe is stated to have been as follows:
>
> | | | |
> |---|---|---|
> | Italy | tons | 360,000 |
> | Spain | " | 4,000 |
> | Austria-Hungary | " | 3,750 |
> | German Empire | " | 14,500 |
> | Belgium | " | 450 |
> | Total | | 382,700 |
>
> "By far the greater part of sulphur produced in Sicily and elsewhere is used for the manufacture of sulphuric acid."

Other uses of sulphur are to make sulphuretted hydrogen, the various chlorides, sulphurous acid, thiosulphates, vitriol.

It is used in immense quantities in all sorts of manufactures, aniline colors, paper-making, electrotyping. Its secondary form is either the "flowers of sulphur" (flores sulphuris) or "snow" of a fanciful appearance, or is made into "rolls," which is melted sulphur cast into the customary rods of about one and one-half inches diameter. Another form is "milk of sulphur," which is very finely divided sulphur, produced by some chemical process. Of the refined sulphur only a very limited amount is available for making gunpowder. See title Gunpowder in Encyclopædia Britannica, Vol. II, page 320, where find:

"For the manufacture of gunpowder, only the crystalline electro-negative variety of sulphur soluble in bisulphite of carbon is used. Sublimed sulphur, commonly called 'flowers of sulphur,' which consists of minute granules of insoluble sulphur enclosing the soluble variety, is considered unfit for gunpowder."

On page 324, Vol. 11, is a description of "milk of sulphur" used in the manufacture of gunpowder, from which we shall quote a few words:

"The surphur from Sicily, known as 'Licara firsts' is employed for the best gunpowder; it undergoes a rough purification before importation, leaving from 3 to 4 per cent. of earthy impurities."

The sulphur imported by libellant Parsons, was crude brimstone of the quality known as seconds. In the manufacture of gunpowder, of the 100 per cent., 75 per cent. is saltpetre, 15 per cent. charcoal, and but 10 per cent. sulphur. (See page 319, Vol. 11.)

For a description of the sulphur mining, see page 634 of Vol. 22, Encyclopædia Britannica, where find:

"Most of the sulphur or brimstone of commerce comes from the rich fields of Sicily, where in 1884, the annual production had almost reached 400,000 tons. . . . The Sicilian ores are customarily classified as follows:

Per 100 parts of ore sulphur present:		Per 100 parts of ore sulphur recovered:
richest ores	30-40	20-25
rich ores	25-30	15-20
ordinary	20-25	15-10."

Thus not only was this crude brimstone an *unmanufactured* product, but it is a commodity not even whose *primary* use is for military purposes. Thus it may be said, that it is not in its *ordinary* use for military purposes.

As to the destination of these goods, the pre-

sumption is, as Mr. Halleck has said, against their use for military purposes. They were destined to a commercial port, New York, and they were also consigned to the firm of Parsons & Pettit (65), who, it is in evidence, are one of the oldest houses in the brimstone trade in the City of New York (1010). See also evidence of Malcolmson, page 251.

In view of the foregoing facts and conditions of law, and in view of the then existing treaty between Spain and the United States, we respectfully submit that the mere fact that said war existed between Spain and the United States, between the 21st and the 25th days of April, 1898, did not justify the Master in breaking his contract, the performance of which he had entered upon; nor in fact did it have that effect upon the Master between the 21st and the 25th days of April, 1898, because the Master continued loading the sulphur during all those five days.

As we have frequently pointed out, there is not a word of evidence to the effect that he knew of the Queen Regent's decree of the 25th of April, 1898, (874) until the proclamation thereof by the Italian Minister of Commerce, which appeared in the Sicilian paper, which the Master read on the 4th-5th of May, 1898 (p. 216), when for the first time, it appeared coupled with an official notice from the Italian Government, that Italy had arranged with the Spanish Government that sulphur should not be molested; so that both from the fact that it was exceedingly doubtful whether crude sulphur under any circumstances is contraband, and inasmuch as whether even refined sulphur should be declared contraband, depended first, upon the abrogation of the treaty between the United States and Spain, which had existed for 103 years, and second, even if that treaty were abrogated,

it was a question to be decided whether sulphur should be put upon the contraband list. It seems a most extraordinary proposition to say that the master was justified in throwing the cargo back upon the wharf, thus causing delay, even at his own expense, or in addition to the delay, causing libel lants the great expense of discharging and storing the cargo.

Nor can we imagine that this Court can approve of the proposition that in view of the open question as to the contraband character of sulphur at all, the master was not bound to wait twenty-four hours or twenty-four days, or any time at all to find out whether, as a matter of fact, the treaty would be abrogated, and even then whether Spain would put sulphur upon the contraband list. But apart from all this, and even supposing instead of being crude brimstone, the cargo had actually been gunpowder, we respectfully submit, that if the master had known, as he admits he does, of the steps being taken with daily increasing prospects of success to pass that commodity free of capture, it would have been his duty to have delayed a reasonable time for the result of those negotiations.

It is stipulated in this case between all the parties, that the newspaper articles, to which we have referred, in the "Giornale di Sicilia," were read by the Captain of the "Styria" (see stipulation, p. 200-201).

It was also admitted that the master received the protest, among others, of Baller & Company, (p. 222, fol. 890). The reply made by the master to Baller's first protest on May 5th, (p. 222), is on its face disingenuous, where the master says, that brimstone had been declared contraband by one of the belligerent powers, and that that fact was published in the papers. So far as appears in evidence, no such thing appeared in the papers until the 1st-2nd of May, when the newspapers pub-

lished the fact that the Commanders of the Spanish ships had been ordered to allow brimstone to pass free (fol. 860).

The master himself testifies, that he knew that sulphur was contraband, *because* of efforts being made to have it go free; which, of course, really meant not that a contraband character should be removed from it, but that the efforts were that it should not receive a contraband character.

The master, however, does not pretend that he did not know that efforts were being made; on the contrary, he read of them every day in the newspapers, but his sole excuse was that the freedom of sulphur was not "officially confirmed."

As a matter of fact, which we have from the United States Embassy at Rome, the verbal communication made to the Italian Royal Embassador at Madrid concerning the orders given to the Commanders of Spanish ships to respect sulphur, was made on April 29th, 1898 (851). The official note confirming the result to temporarily suspend in regard to sulphur the application of the Royal Decree of April 23d, (*25th*) 1898, concerning articles contraband of war, was dated May 31st, 1898 (p. 213).

We respectfully ask the Court to read through the newspaper publications on pages 214, 215, 216 and 217. The learned Court of Appeals held that the master rightly took no notice of gossip in the newspapers. There are more than newspaper reports, however, of these negotiations. It was commonly talked about throughout the place, and if that was the case whether the master knew it or not, and if he saw the reports, he was bound to have made inquiries as to the true and legal situation, none of which he made, as he admits.

But if justification for the master's acts is to be found outside of the Bills of Lading, then the Court must consider the circumstances which were

known to the Master or which he ought to know, and so must be deemed to have known.

See The "Adula," 89 Fed., 358, 176 U. S., where it is held that notice is sufficient, if the proof shows that it was known in a general way.

The Stephen Hart, 22 Fed. Cases, 1253.

And in Duer on Insurance (Vol. I, p. 663, Section 79), referring to blockades, is stated:

> "Proof of the actual knowledge of the party at the inception of the voyage . . . *supersedes in all cases the necessity of a warning, nor is it of any importance by what means or in what form he received the information if the communication made to him is credible in its nature.* . . . He is not permitted to aver that he placed no confidence in a communication that had just claim to his belief."
>
> "And even in the absence of actual notice, since the proof was sufficient to show notoriety of the fact that a blockade exists at the port to which the voyage was commenced, it raises a presumption by which the party charged with the offence may be concluded."
>
> 1 Duer on Insurance, p. 661.

The Court must take into consideration facts which should have caused him to take counsel of his hopes, as well as of his fears.

One of the greatest industries of Sicily is that of sulphur. Girgenti is one of the chief export towns for the product. It was evidently a matter of the greatest moment to the island, and to the town of Girgenti, and indeed to the Government of Italy (472, 473), solicitous for its commerce, whether or not the trade in sulphur with the United States should be shut down. The Styria went to Girgenti to get this cargo; went for that purpose and loaded no other there (524).

It was the principal, if not the only, thing the master must have had on his mind, or ought to have had on his mind, especially after he had loaded, and the question arose in his mind as to completing or throwing up his contract (526). His

plain duty to the shippers was to comply with his contract.

It was his duty, therefore, to exert himself; to communicate with the owners before commencing the discharge; to take the most active steps in acting upon information affecting the chance that sulphur might go free; it was his manifest, indeed commonplace, duty, especially if the conditions are deemed extraordinary and somewhat without precedent to guide him, to take care that his judgment and discretion were exercised with equal courage and caution.

Now, we say that from the 24th of April to the 7th of May, the most active steps were being publicly taken by the merchants, the Boards of Trade or Commerce, the Deputies and the Italian State Department, to procure a relaxation of the Spanish War decree, in favor of the commerce in sulphur with the United States.

All these things he knew of (fols. 449, 454, 467-474, 494, 501, 532, 801).

Everything that called up caution in his mind ought to have called up courage.

Exhibit 19 (853, April 24th, 25th) of the "Giornale di Sicilia" showed that steps were *immediately* begun by the Italian Government to prevent sulphur from being held contraband.

This was *three days prior* to beginning the discharge, and must have been common and important knowledge at this sulphur export town.

Exhibit 20 (855, "Giornale di Sicilia," April 26, 27) is to the same effect.

Exhibit 21 (856, April 27th, 28th) is so likewise.

Exhibit 22 (April 29th, 30th) states that Señor Sagasta *promised that a decision should be rendered* to-day (April 29); and that the Minister of Marine, alone, seemed decidedly adverse to the proposition; but it was hoped that the Italian demand would be conceded.

In fact it was settled on this 29th of April (851).

Exhibit 23 (May 1st, 2d). The correspondent assured the people of Sicily absolutely (and it was true), that the Spanish Government has determined to let brimstone go free.

He cites the "Popolo Romano" (the chief paper in Rome) as confirming his information .

The same exhibit states that the Official Gazette of Rome will publish the decision and that the Spanish ships had orders (and so they had) to let it pass free and that several deputies from Sicily who had interested themselves in the subject secured full confirmation.

Exhibit 24 (861, May 3d, 4th), states that although the Official Gazette was not to publish the Spanish Government's decision, the Minister of the Interior sent a circular to all Prefects in Sicily (showing how important it was to the Island) informing them of the orders relative to the free navigation of brimstone cargoes.

So, also, "Giornale di Sicilia" Exhibit 25 (May 5th, 6th). Here is the circular telegram by the Minister of the Interior to the Chamber of Commerce, Palermo:

"I inform the Chamber of Commerce for the useful *information of merchants* that by the decree of April 23d are considered as contrabands of war, etc., etc.

I would also state that in consequence of our request, the Spanish Government has given notice to the commanders of its vessels to let sulphur pass free.

The Minister Coeco-Artu."

In other words the first official news that said sulphur was declared contraband, also said it was virtually free.

In the Nobels Explosive case, 2 L. R. (1896), p.

332, it is said: "Whether the master has discharged his duty must depend upon the circumstances of each case"; and on p. 331: "There was no reason to expect that the obstacle in the way of the vessel could be removed in any reasonble time."

Now, can your Honors question for a moment that if, in that case, it had appeared that the master was *aware* that Great Britain was actively engaged in negotiations with China, to let dynamite from England to Japan go free; that the first news of the war was accompanied by news of these negotiations; that their daily progress and fair prospects for success were daily chronicled; and were of immense importance to no end of people in England and Hong Kong, and to those owning cargoes afloat; that in four days after the news of the outbreak, the papers state positively and truly that the negotiations were successful; that in five days promise of the issuing of the news in official papers was given; that public officials interested had been informed of it; that immediately thereafter public official announcement was made that it was true; is it possible to suppose that the Court would have held the defendants to have acted with prudence, reason and courage, in turning out the cargo at great loss and expense to the owners without waiting for or inquiry about the altogether probable, and the eventual outcome of these negotiations?

Italians and others in Italy in public matters take their instructions and derive their information from the *Italian Governmental agencies.*

Information to Italians concerning international matters, and matters affecting Italian Commerce, is conveyed to Italians and others in Italy involved in her commerce through the Italian Government.

Wharton Int. Law., "Neutrals," Section 116.

It is, we submit, beyond any reasonable inquiry here, whether Spain made an official or unofficial decree or ruling on the question of sulphur. No matter what kind or degree of sanction the ruling had, so long as it was communicated to the Italian Government, and the latter communicated it to Italians and others in Italy, that settled it; and it would be absurd for us, here, to question whether Scopinich could safely act upon Spain's ruling, when we find the Italian Government publicly announcing the fact and the fact of its communication and the effect of the ruling.

Notification to a foreign government would clearly be to include all the individuals of that nation, it being the duty of the government to communicate the information to its citizens.

Olinde Rodrigues, 89 Fed., 107.

The Minister of the Interior announces to the public of Sicily, for them to act upon it, that Spain and Italy had an agreement so far modifying the Spanish decree as to allow Italian sulphur to pass unmolested; and it did not lie in Mr. Scopinich's mouth to question whether Spain had "officially" announced it or not.

The negotiations were for the benefit of Italian shippers and their consignees, and when they said "go ahead with our sulphur," it was not Scopinich's business to say, "I don't feel satisfied that Spain has officially announced this and so I will discharge your goods onto the wharf."

So he might, nevertheless, but he must not charge libellants with the expense and loss; it was purely for the ship's benefit and not ours; and it is disingenuous for the master to pose as having acted for us.

The master's duty, therefore, was to have waited to find out the result of the negotiations; and as

before he began to discharge, and from day to day thereafter, the progress of negotiations was chronicled and their success more and more assured, the Court will not hesitate to hold the master to a high plane of duty, realizing the effect of a ruling that would leave masters free to violate their contracts upon very light or upon no pretexts.

Medeiros *vs.* Hill, 8 Bingh., 231.

It is evident either that the master was negligent, or that he abandoned himself entirely to the instruction of Burrell & Son. He says he did not notify them of the efforts being made to let sulphur go free (574) and the first step Burrell & Sons took to find out about the matter was on *May 9*, 1898, (page 202).

As in the "Hugo" (168 U. S., 123) it appears that the cargo was thrown overboard by order of the master, from unfounded apprehension on his part, in the absence of pressing peril to the ship, and with no apparent or reasonable necessity for it. And the case is saved from being barratry "because there was neither intentional fraud or breach of trust nor wilful violation of law, one of which at least is necessary to constitute barratry."

Comp. La. Flecha *vs.* Brauer, 168 U. S. 124.

But all this information was disregarded by the master, because he says it was not *officially* confirmed, and he was not *officially* informed. In other words, notwithstanding the fact that one of the Italian Ministers publicly announced to the merchants and Prefects of Sicily, that the Spanish Government had notified Italy that it had informed its men of war not to molest sulphur, Mr. Scopinich persisted in being unsatisfied of the sincerity and value of this communication, because he says, it was not "officially confirmed."

This is not, however, the first time that the excuse that something had not been *officially* done or communicated has been before this Court. The very same excuse was made by one Solis, the charterer of the "Adula," which was before this Court in the October Term, 1899, 176 U. S. 361.

Speaking of the blockaded condition of Guantanamo, this Court says, page 380:

> "We think there is a preponderance of evidence to the effect that both Solis and the master of the Adula knew of the actual blockade, that it was generally known in Kingston before she sailed, and that the Adula was chargeable with the breach of it. . . . It is scarcely possible, that it should not have been known in Kingston, which was only a day's trip from the southern coast of Cuba. . . . This probability is confirmed by the direct testimony of the sailor Morris, that it was a matter of common talk in Kingston. The testimony of Solis that he did not know 'officially' that Guantanamo was blockaded, by which we are to understand that it had not been officially proclaimed, is perfectly consistent with a personal knowledge of the actual fact. His statement seems to be little more than a convenient evasion."

So when a vessel belonging to Bremen was captured on her voyage outward from Amsterdam, then in a state of blockade, and it was pleaded in her behalf that the blockade existed *de facto* only, and that no notification of it had been made to the Hanse towns, Ld. Stowell condemned the ship and said:

> "At Amsterdam it must have been a subject of general notoriety that the port was legally considered, by the English, in a state of blockade; and it is impossible that it should not have come to the knowledge of this Bremen man. It is not to be said by any person, 'although I know a blockade exists, yet because it has not been notified to my court I will take out a cargo.' If it was known to every Dane and Swede it is impossible that it should not be known to this man."
>
> The Adelaide, 2 Rob., Ad. Rep., iii.

Nor can the excuse which will undoubtedly be

made upon this argument, as was made before, that there was no certainty that the communication made to Italy by Spain would not be withdrawn at any time, and that it was only temporary, be seriously considered.

We respectfully submit, that the suggestion that after having induced, as it were, neutrals to sail with sulphur as a free cargo, the Spanish Government would turn around suddenly and indecently withdraw their word, is preposterous.

As this Court said in the Buena Ventura, 175 U. S., p. 388.

> "It being plain that merchant vessels of the enemy carrying on innocent commercial enterprises at the time when hostilities between the two countries broke out would, in accordance with the later practice of civilized nations, be the subject of liberal treatment by the Executive, it is necessary when his proclamation has been issued, which lays down rules for treatment of merchant vessels, to put upon the words used therein the most liberal and extensive interpretation of which they are capable; and where there are two or more interpretations which possibly might be put upon the language, the one that will be most favorable to the belligerent party in whose favor the proclamation is issued, ought to be adopted."

Nor was there anything unusual or doubtful in the form of communicating the Spanish orders to her vessels by a circular letter to merchants and prefects.

We find for example another instance of it in Vol. 2, Second Edition, p. 716, Wharton's International Law Digest, where he says:

> "On August 27, 1793, Mr. Jefferson, Secretary of State, addressed the following circular letter to the merchants of the United States:
>
> "'Complaint having been made to the Government of the United States . . . I have it in charge from the President to assure the merchants of the United States concerned in foreign commerce or navigation, that due attention . . . '"

As to the instructions given by the Spanish Government to her cruisers, as compared with some official decree or proclamation, which the master of the Styria was to wait for, we would respectfully point out that the direct consequences of war are not self-executing, and that if governments neglected to give orders to their armies and navies to march or to capture, the armies and the navies would not move an inch. War is carried on both against the enemy and in the capture of contraband goods, etc., upon the direct orders of the sovereign to its various commanders, and we find in the decree of the Queen Regent which refers to the state of war existing between Spain and the United States, in Article 5, fol. 871:

> "In order to capture the enemy's ships, to confiscate the enemy's merchandise under their own flag and contraband of war under any flag, the royal navy or auxiliary cruisers and privateers, if and when the latter are authorized will exercise the right of visit upon the high seas and in the territorial waters of the enemy, in accordance with international law and in the regulations which may be published for the purpose.
>
> "Article 8: 'The Ministers of State and the Ministers of Marine are charged to see the fulfillment of the present royal decree and to give the orders necessary for its execution.'"

Inasmuch, therefore, as the consequences of carrying contraband goods come through the direct orders of the sovereign to its vessels, so naturally the most direct order for freeing goods from any contraband character they might acquire or have, would be by similar orders to the cruisers to allow such cargoes to pass free.

Such, indeed, was the course which was taken in regard to sulphur in the late war (see fol. 838); and that such suspension, even though temporary, would not have been arbitrarily rescinded, was made clear by the contents of fol. 830; that the or-

der would not be revoked without notice; nor would it apply in any case to vessels at sea in ignorance of it, and that the necessary time would be given for the execution of pending contracts.

We respectfully submit, that we have demonstrated that our sulphur was unlawfully discharged by the master of the Styria on or about the 27th of April, 1898, without the slightest justification, either in law or in fact; that the actual shipment, being crude brimstone, was not contraband goods as a matter of fact, and that in any danger of it becoming contraband goods, it was the master's duty to have taken steps, and to have waited a reasonable time, in view of the information which he had, to discover the intentions of Spain in regard to it; and even assuming that sulphur was contraband, that fact would not have justified the master in throwing the cargo off, on the plea, which he and his counsel make and which the Court of Appeals seemed to countenance, that the shipment having become "unlawful," it was not within the contemplation of the parties to carry an unlawful cargo, and, therefore, the master was excused in discharging it.

In the bill of lading in this suit, which is the Company's bill of lading, (fol. 405), to wit: a bill of lading on a regular printed form, which the Company used, the ship agrees to "carry goods of all kinds, dangerous or otherwise"; not only did she not agree to carry only lawful goods, but she agreed to carry any goods whether dangerous or otherwise.

Westcott *vs.* Fargo, 61 N. Y., 553.

In other stipulations in the bill of lading, tending to excuse the non-carriage of the goods, such as restraint of princes and blockade, any conditions of the goods must be exclusive of any quality which they had or acquired as dangerous from any cause; but further we find it laid down by Judge Kent in the case of Seton *vs.* Low, 1 Johnson's Cases, 1:

"That contraband goods are 'lawful goods' (under a policy of insurance), and that whatever is not prohibited to be exported by the positive law of the country is lawful. . . . The fact is, that the law of nations does not declare the trade to be unlawful, but only authorizes the seizure of contraband articles by the belligerent powers; and this it does from necessity. A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade; and yet, the powers at war have the right for self-defense to seize and confiscate contraband goods. . . . A trade by neutrals, in articles contraband of war, is therefore, a lawful trade, though a trade, from necessity, subject to inconvenience and loss."

(B.) THE BLOCKADE EXCUSE WAS RIDICULOUS. THERE WAS NO BLOCKADE OF THE PORT OF NEW YORK EITHER ON PAPER OR DE FACTO.

There is no evidence that the port of New York was blockaded as a matter of fact, or that any attempt was ever made to blockade it; nor was there any blockade of the port of New York ever proclaimed.

The master never heard of any blockade of that port (146-462).

In fol. 162 where the master says: "I heard a blockade is coming on, too; so it was talked, you understand, I do not know," must mean merely that there was some talk that New York was going to be blockaded by Spain. He had already testified that he did not hear about the blockade, and that he was not sure that he thought it was.

(C.) THE EXCUSE THAT IT WAS UNSAFE TO ENTER THE PORT OF NEW YORK HAS NO FOUNDATION IN THE FACTS OF THIS CASE.

As a matter of fact, when he sailed on May 8th, his own excuses were absolutely baseless.

In the first place the master stated as his reasons for discharging the cargo, that the voyage was "risky" (426-427, 431, 459-460).

Asked in fol. 458 what he meant by that, he said that it was "to carry out the conditions of the bills of lading. * * * That means if the master thinks it unsafe to proceed, etc. * * * In case of blockade or interdict of the *port of discharge* or if without such blockade or interdict, the master shall consider it unsafe for any reason to *enter* or *discharge* cargo there."

The plain reading of the bills of lading is, (459) if the master shall consider it unsafe for any reason to *enter the port of discharge* or *to discharge the cargo there,* he may deliver it into a warehouse, etc., at the nearest port.

There is no exception in terms allowing him to discharge at the port of loading before sailing, if he thinks it unsafe to leave the port of lading, and charge it to the shipper.

Nor if he thinks it unsafe *to sail from the port of lading,* may he discharge the cargo he has contracted to carry and deliver; but only when it is unsafe to *enter* the port of discharge or to discharge *there.*

Such are the plain terms of the agreement made between the parties. There was no reason to consider it unsafe *to enter* the port of New York unless "to sail from Girgenti" is to "enter New York;" there was no reason to consider it unsafe to discharge cargo in New York, unless the fact that there was a risk of detention thousands of miles from New York made New York an unsafe port to enter or to discharge at.

Of course, if this Court comes to the conclusion that when the parties to a bill of lading agree to excuse the failure to deliver cargo at the port of discharge, because it was being blockaded, or was interdicted, or because of some other reason that port should, in the prudent and courageous discretion of the master, be deemed unsafe

to enter, and discharge at, the parties really meant that if the master, for *any* reason should fancy that it was unsafe to *sail* from the port where he had just taken on his cargo, there is nothing more to be said, but to accept that interpretation of such a contract; but we respectfully submit that such a ruling will be a violent wrench to the natural meaning of the language which the parties used and without the support of any adjudicated case, and we respectfully ask the Court to hesitate to sanction an interpretation of such a clause which would excuse the master from proceeding on the voyage if he should deem it unsafe to start on the voyage, because his vessel is unseaworthy, for example, or because his engineer is drunk, or because he is short-handed, or because violent tempests are prophesied, so that he might therfore say: "I consider it unsafe to *enter the port of destination or to discharge my cargo there.*"

Exactly how far the master must proceed upon his voyage or precisely how near to the port of destination he must go before this clause can come into effect, it is unnecessary here to decide, we submit; but at all events this clause could not have been intended by the parties to this contract and cannot be intended by the parties to such a contract, which is of daily occurrence, that it should be used as a justification on any pretext whatever for the master to refuse to start upon his voyage and a justification for discharging his cargo at the port of lading.

Assuming that it is possible to construe it as literally covering such a case, we submit that it cannot have been within the contemplation of the parties.

There are plenty of other terms in the bill of lading which naturally bear upon such a situation, and apart from the coloring which we think this

clause about an unsafe discharge at the port of destination should receive from the surrounding language, which quite plainly seems to contemplate a condition of affairs where actual access to the port of discharge is unsafe, by reason of some conditions then immediately affecting that port, as distinguished from a general inability for any reason to *sail* or to *continue sailing towards* the port, we further submit that there is ample language to cover such a case, which we find for example at fols. 195-196, where the Court will find that the ship has the liberty "in the event of the steamer putting back to this or to any other port or otherwise, being prevented from any cause from commencing or proceeding in the ordinary course of her voyage, to ship or transship the goods by any other steamer."

Again there is the excuse, where it properly applies, of restraint of princes, the act of God, Queen's enemies, pirates, etc., etc., and the negligence, default or error in judgment of the pilot, master, marines, engineers, bursting of boilers, unseaworthiness arising from the certain causes named, and also there is the clause found at fol. 212, that the ship has the liberty "either before or after proceeding towards the port of discharge to proceed to and stay at any port or places whatsoever."

But still further, we submit, that any excuse for non-delivery of the goods which is permitted by the bill of lading must always be considered with reference to the special circumstances of this case, and that even should the clause now under discussion have any application at all to such situation, nevertheless it must be applied in view of the circumstances of the case and of the obligations of the master thereunder.

Even supposing that the master could have deemed it unsafe to enter New York because there

was a risk of a delay to the ship by reason of a possible seizure of the cargo, nevertheless it was not so imminently unsafe on the 27th of April, 1898, when the master commenced discharging, but that he could have awaited the encouraging progress of Italy's efforts to induce Spain not to put sulphur on the contraband list.

The Nobels Explosive case when attentively read gives no support whatever for any such proposition.

That case was a nisi prius case, and the learned Judge after disposing of the case, on the ground that he thought the clause excusing the vessel when delivery was prevented by a restraint of princes applied, went on to say at page 331:

> "There was a further clause in the bill of lading upon which the defendants relied, and which seems to me to afford a further answer to the plaintiffs' claim, which clause is as follows: 'If the entering of or discharging in the port of discharge shall be considered by the master unsafe by reason of war or disturbances the master may land the goods at the nearest safe and convenient port at the expense and risk of the owners of the goods.' It was said that this clause was only intended to apply where difficulties arose upon the vessel's arrival at the port of destination. But I see no ground for this narrow construction. The object was to enable the master to guard against obstacles which might prevent his vessel from reaching her destination in due course."

The clause in that case merely required the master to proceed to the nearest safe and convenient port to Yokohama. That is very different from not sailing at all after having loaded the cargo, and even there it was said:

> "There was no reason to expect that the obstacle in the way of the vessel could be removed at any reasonable time."

Nor does it seem just that the ship should have the privilege of complaining that any quality of this cargo should justify the master in saying that

it rendered it unsafe for him to proceed on his voyage, when he undertook "to carry goods of all kinds. dangerous or otherwise" (fol. 78).

It seems to us that the only clause in the bill of lading which justifies the Steamship Company in not carrying goods on a steamer on which they were loaded, because of any quality in the goods themselves, was the clause reserving liberty to transship any part of the cargo by a steamer, which immediately followed the clause permitting the vessel to carry goods of all kinds, dangerous or otherwise; or to proceed to and remain at any port or places whatsoever.

FOURTH POINT.

The contract was merely suspended at the most by the supposed risk: it was not discharged; and the master should have re-loaded the cargo on May 7th, 1898, when even the supposed risk had disappeared.

It is laid down in Abbott on Shipping, page 704, that if the voyage is rendered simply more hazardous, the contract is not dissolved, and each party must submit to the extra peril, unless there is a mutual agreement to abandon.

In the case at bar, it is evident that the relations between the United States and Spain had been strained for a long time prior to the 21st of April, 1898, and therefore when the master started in to load on the 21st, and continued loading down into the 25th of April, 1898, it seems unjust to hold that a contract which was made by the parties both equally knowing the risk, if any, which was being

taken, should be thrown upon one of them with the added obligation of paying for the immunity which the other party obtained by his conduct.

In relation to this, we would point out to the Court the provision in fol. 81 of the bill of lading which in the event of the vessel being prevented from any cause from commencing or proceeding in the ordinary course of her voyage, allows the ship to transship the goods by any other steamer; or to stay at any port (212).

None of these clauses contemplate a destruction of the contract of carriage, but merely a variation and suspension of it, still keeping in view the principal object of transporting and delivering the goods.

None of the exemption clauses, such as the act of God, the Queen's enemies, pirates, robbers, restraint of princes and rulers, etc., justify the non-delivery of the goods unless they have actually prevented the same; they merely justify delay where those reasons have caused a delay; they none of them contemplate an abrogation of the contract, except so far as they shall actually destroy the same or prevent the ship from delivering them under any circumstances.

The only case that has held to discharge the contract, is that species of restraint of princes which is called a blockade; even a blockade would not work a discharge of the contract, unless the same were purely executory, as the matter of a blockade is specially guarded in the contract in suit (93). The principal *expressio unius est exclusio alterius* would forbid a discharge of the contract and of the cargo for the reason of restraint of princes, where that sort of restraint was a blockade.

Again the cases from which we have cited so much at length in our Second Point, all indicate very plainly that the only effect of having shipped contraband goods, where there is no question of

fraud between the parties, would be to suspend the operation of the contract and not to discharge it.

While as we have seen a blockade of the port of destination under the English and American law is regarded as a permanent obstacle to the completion of the contract on either side, yet an embargo or blockade of the port of departure, which we submit is the utmost effect of the conditions which the master is supposed to have believed to have existed, merely suspends the contract until the embargo is removed.

Palmer *vs.* Lorillard, 16 Johns., 348.

(For an interesting discussion of this question, see The Spartan, 25 Fed. Rep., p. 51-52.)

Scott *vs.* Libby, 2 Johnson 336, was a case of a blockade of port of discharge, and it was therefore held that the contract was dissolved, not however, upon the ground that the performance of the contract was in violation of the law of nations, but because in the nature of things, it was impossible for either party to perform or expect performance; the vessel to discharge or the consignee to accept delivery.

Nor would it be within the rulings of this Court to say, that *vis major* did put an end to the contract in suit. This Court went into the question of what was meant by *vis major* in the recent case of Crossman *vs.* Burrill, 179 U. S., pp. 112-114. In that case it was claimed that where a vessel was unable to discharge at Rio de Janeiro, because of ships of war being in the harbor, actually firing at the town, she was in such case prevented by *vis major* from unloading; and with regard to the cases cited to the effect that such failure to discharge was a default of the charterer, the Court said that such *vis major* was:

> "In the words of the opinions above cited, a 'superior force, acting directly upon the discharge of the cargo;' 'a direct and immediate *vis major;*' an 'unusual and ex-

traordinary interruption that could not have been anticipated when the contract was made;' a sudden and unforeseen interruption or prevention of the act itself of loading or discharging, not occurring through the connivance or fault of the charterers;' 'an interference on the part of an armed force, preventing the handling or moving of the cargo.'"

If then the master chose to discharge the cargo rather than keep it aboard the ship, where it was, (which would be an act of doubtful propriety any way, because as shown in the testimony, a fair percentage of the weight of sulphur is lost in handling) nevertheless he should have done so if at all only at his own expense, and inasmuch as the question, so far as it was an open one, was settled in favor of the cargo, (96) and before he sailed, and was known by the master to have been so settled on the 5th of May, he should have re-loaded before sailing on the 8th, and at his own expense.

FIFTH POINT.

No available stipulation in the bill of lading permits the expenses of discharging, storing and re-loading to be settled on the libellant; it was all for the ship's benefit.

There was no "transshipment" within the purview of the bill of lading; and should the discharge be considered as a transshipment, it should not be at our expense.

The bill of lading authorizes transshipment in the following terms and places.

At fol. 78, vessel has the liberty to transship any part of the cargo by steamer; at

Fol. 81, after reciting a great number of acci-

dents to the vessel which should excuse her under such circumstances, the bill of lading provides, that the vessel has the liberty in event of putting back to this or into any other port or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage, to ship or transship the goods by any other steamer.

None of these transshipments are declared to be at the expense of the shipper of goods, inasmuch as they are all described as liberties; they are clearly options which can be exercised by the vessel; not being options to be paid for by anybody else, they must be, of course, exercised at the ship's expense.

In the case of Touteng *vs.* Hubbard, 3 Bos. and P., 298, Lord Alvaney says:

> "I will first consider for what purpose and for whose benefit the words 'restraint of princes and rulers during the said voyage always excepted' were inserted in the charter party. It appears to me that they were introduced for the benefit of the master, not of the merchant, and that the true construction of the charter party is this: The captain engages to go to St. Michaels, restraint of princes excepted, and the merchant engages to employ him and furnish the ship with cargo. Lord Kenyon in the case of Blight *vs.* Page, put this construction on an instrument nearly similar with the present."

If we are correct in our proposition that the crude brimstone is not contraband *per se,* or necessarily within the term "sulphur," and may or may not be put upon a list of contraband of goods by belligerents upon the breaking out of war, we respectfully submit that the master, preferring to discharge his cargo rather than await the result of proper inquiries and the lapse of a reasonable time to find out how the question was going to be decided as to whether sulphur should be considered contraband or not by the Spanish Government, should be deemed to have discharged the cargo for the benefit of the ship, inasmuch as it was not absolutely necessary to do so instantly.

SIXTH POINT.

The Court of Appeals correctly decided the rule of damages and correctly applied the stipulation of August 12th, 1898; the invoice value clause has no application to the case at all.

The libellant was entitled to the market price of brimstone here when the vessel arrived.

If there was anything deductible in *mitigation of damages,* there is no dispute that the claimant is entitled to the benefit thereof.

The Styria arrived on or about June 3d, 1898. Upon due demand her master refused to and did not, deliver the merchandise receipted for by the bill of lading, and contracted to be delivered here in New York. Such demand and refusal and non-delivery are *prima facie* evidence of a conversion by the master.

The evidence showed that he had received the cargo on board, and had cleared from the loading port, Girgenti.

He is thus, *prima facie,* liable for a conversion of the libellant's brimstone, or he is liable for a breach of contract to carry and deliver it. He then undertakes to defend and justify. True, he says, "I did load the brimstone and clear from Girgenti; but, *'facts of war'* justified me in putting your brimstone overboard, and storing it and at your expense, and sailing without it."

The Court found against him on this defense and alleged justification. There can be no fair dispute as to the measure of damages that ought to follow, to wit, the value of the goods at the place of discharge, and at the time when they should have arrived there, less freight.

This was on or about June 3d, 1898, when the vessel arrived in New York; and the market price was then $35 a ton, or $12,250.

Sturges *vs.* Bissell, 46 N. Y., 462.
Harris *vs.* Del. R. Co., 61 *id.*, 636.
Woodward *vs.* Ill. Cen. Co., 1 Biss., 403.
Mobile R. *vs.* Jurey, 111 U. S., 584.
N. Y. Co. *vs.* Estill, 147 *id.*, 591.

But the District Court held the parties had contracted in the Bill of Lading to limit the damages for *any* non-delivery to the invoice price of the goods; that there was no conversion or breach of contract, but only an error of judgment on the master's part.

(*a*) We understand that a vessel undertakes absolutely to deliver property shipped, unless excused by some of the exceptions plainly provided by the contract of carriage—and that upon a failure to deliver, after demand and refusal, the master or owners are liable, unless excused by some such clause.

And as there was not a case of negligence in the performance of the contract, but an absolute abandonment of it, voluntary and intentional, by throwing them back on the wharf; we fail to see why there was not a conversion thereof to his own use within the meaning of the law.

It was a more flagrant case than that of Keeney *vs.* Grand Trunk, 47 N. Y., 525, where carloads of cattle were abandoned on the road for a few days, for there was no special intention as to such cars, but as to all goods except such as would become dutiable in a day or two. Yet the Court said that this "can in no sense be regarded as an act of negligence in the execution of the contract. It was for a time an entire abandonment of all effort to perform, intentional on the part of employees of the company."

The "invoice price" limitation had no application under the circumstances.

(*b*) But the whole clause referring to "invoice value" has no application by its terms to facts like those at bar. The sentence is part of a limitation of liability in a certain class of damages to the goods (fols. 90-91). The clause, we submit, is to limit the damages to the "invoice value" in cases *ejusdem generis* as the specific instances named in the clause.

These instances, read with the "invoice value" condition, mean:

For any *damage to the goods:*

1. Which is capable of being insured against; or

2. Which is not notified before removal; or

3. Which arises to goods on through bills of lading from injury or detention while goods are not in ship owner's possession:

The ship owner is not liable beyond the invoice or declared value.

But:

1. The brimstone was not *damaged* at all.

2. The loss to the owners was not insurable.

3. Notice was given before the goods were removed; they never were removed, and the clause has no application at all.

4. No question of through bill of lading arises.

The limitation, therefore, has no facts present to act upon.

(*c*) Finally we submit that the limitation to the "invoice value," when the loss or damage arises out of the carrier's *negligence* or wrong doing or

abandonment of duty, unless that is directly excepted, is not applicable.

The carrier had not contracted against his own negligence in general (see bill of lading, fols. 79-81), but only against specific cases of damage, whether they arose from negligence or otherwise, none of which cover the case at bar.

The very same principles of this Court, that forbid exemptions from negligence, altogether apply to this case. It is a mere question of degree whether a carrier shall pay nothing by reason of a total exemption from negligence; or pay the "invoice value" by reason of a partial exemption where there has been negligence, so long as it is admitted that the true legal measure is the market value at the port of destination.

If it is against public policy for the Styria to clear itself of all liability for $11,200, (fol. 72) arising from her negligence, it really seems impossible with any regard to consistency to hold that she can clear herself of the difference between $11,200 and $6,925, the "invoice value" of the brimstone (fol. 1116), if the master or owners have been negligent and caused the loss.

The consequences had in view by the Supreme Court in denying an exemption from negligence, are just as serious and likely to happen in one case as in the other; and the greater the difference between the invoice price and the market price at destination (and, therefore, the greater the loss to the owner of the goods), the greater temptation to a master or ship owner to conceal a fraud by covvering it with negligence.

In the case at bar, had sulphur been high priced in New York in September, the ship owners, on the very ruling of the District Court in this case, had it been decided between June 3d and September, 1898, could have paid Parsons the "invoice value" of the sulphur and brought it over and sold

it here, for, say, $12,000, or at some other high price.

If the limitation to the "invoice value" is considered an advantage, because it avoids speculation as to possible profits, it is respectfully submitted that it is more important to avoid the possibility of the master or ship owner speculating on the advantages of breaking his contract, than to avoid an investigation as to the amount of the legitimate profits to the owner of the goods.

This Court has not yet decided the effect of invoice price limitation on a loss or damage by a carrier's negligence where it is not expressly excepted. In Calderon *vs.* Atlas Co., 69 Fed., 574. Judge Wallace in a dissenting opinion referred to the question, but it was not directly involved, we believe; and this Court in reversing the Court of Appeals (170 U. S., pp. 278-279) said that its validity depended upon a distinct valuation of the goods, and a proportionate freight charge accordingly.

And we respectfully submit, that anything which in any degree tends to make negligence easy or useful for the master to indulge in, especially in a case where he thinks he can do his owner a good turn at the expense of the cargo, is plainly within the reason of the rule forbidding exemption from negligence on the part of the carrier.

In the case at bar the Court will see that the rate of freight is the same for all the brimstone, notwithstanding that the lots were of different qualities and ton values.

Parsons had "seconds" worth $35 a ton for which he paid six shillings and seven and six pence per ton freight (fols. 67, 68, 1047), Malcomson had "seconds" and "thirds" worth $35 and $30 a ton respectively (1039, 1047, 1055) for which he paid six and six pence per ton freight (139), and Munroe had "seconds" (1069) for which he paid six and three pence per ton freight (196).

Nor was there any agreed valuation, nor anything to show that the rate of freight in any way depended upon the value of the goods.

(*d*) But here the ship owners, in Glasgow, without giving any reasons so far as the evidence discloses, ordered the sulphur overboard (457).

So far as the evidence goes, they never made the least inquiry about the circumstances until May 9 (fol. 805), and never heard from Scopinich and made no inquiry of him (fols. 495, 496, 573, 574, 578).

They put our goods out on the wharf, involving us in legal complications, expenses and loss (fols. 483, 504, 552); sent their ship to Messina for a paying cargo of fruit (fol. 475) and then meet us with the proposition to pay us nothing at all, but that we must re-imburse them; but the most they say we can get is the invoice value.

We submit that this is nothing less than the claim to a right of pre-emption at the invoice price, of all goods loaded on to their ships under bills of lading like those at bar. For any reason satisfactory to the owners, they can dispose of their ships' cargoes and in the opinion of the District Court hand the invoice price to the shipper or consignee. Merchants must do business with them, subject to that right of pre-emption; subject to the burden of proving an intent to defraud. It is a direct encouragement to negligence and worse, when the market price at port of discharge is sufficiently above the invoice price.

On August 12, 1898, before the claimant had answered, the following stipulation was made:

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MALCOLMSON *et al.*
against
THE STEAMSHIP "STYRIA," etc.

MORGAN *et al.*
against
THE SAME.

PARSONS *et al.*
against
THE SAME.

MUNROE *et al.*
against
THE SAME.

It is stipulated and agreed between the parties as follows:

1. The claimant shall forward the cargo landed ex "Styria," at Port Empedocle, on the first available steamer from that port to New York, and shall deliver the same to the consignees, upon the terms and for the freight specified in the original bills of lading, the consignees to receive the same and to pay the agreed freight on right and true delivery; the goods upon arrival to be sold at current market rates, and the proceeds, less charges incurred, to be credited on account of the damages, if any, recovered in these cases by the libellants.

2. The claimant shall have a lien on the portions of the cargo to be delivered to the several libellants for the respective amounts of the charges against the respective portions of the brimstone in Sicily, provided the claimant was justified in relanding and storing the cargo at Port Empedocle as and when he did. If it be held that the re-landing and storage of the cargo was not justified, then the said brimstone shall be free from any lien on account of the aforesaid charges or expenses, except freight, which is provided for in paragraph first of this stipulation.

It is the purpose and intent of this paragraph of the stipulation to provide that if the claimant was justified in re-landing and storing the cargo as when and he did, he shall have a lien upon the respective consignments for their respective proportions of the charges and expenses against the same, which the libellants would have had to pay (exclusive of the charges provided for in the first paragraph of this stipulation) if they undertook to forward the cargo for their own account.

3. This stipulation and anything done by any party under it, shall be deemed to be wholly without prejudice in the pending suits, except as herein provided.

New York, August 12th, 1898.

SULLIVAN & CROMWELL,
Proctors for Malcolmson *et al.*

COWEN, WING, PUTNAM & BURLINGHAM,
Proctors for Morgan *et al.*

BOWERS & SANDS,
Proctors for Parsons *et al.*

STERN & RUSHMORE,
Proctors for Munroe *et al.*

CONVERS & KIRLIN,
Proctors for Steamship 'Styria.'

The proposition advanced by the counsel for the claimant is based upon the fallacy that the invoice value clause is an agreed valuation of the shipment; whereas, as this Court has just decided, it is a limitation of damages.

Upon claimant's proposition, the *primary* damages to which the libellant is entitled under the limitation of the bill of lading, are the valuation of the goods shipped up to the invoice value; so that while they may have been worth $35 a ton or $12,250 in June, 1898, when the Styria arrived, $6,925, the invoice value, less deductions for unloading, etc., is all that is recoverable. This view would render unnecessary and improper any evidence or investigation of the value of brimstone when the Styria arrived without it.

From this primary measure of damages claimant would subtract the net value *ex* Abbazia.

That was the view of the learned District Court, and that is the notion that claimant's counsel seeks to get this Court to hold by a mistaken application of the stipulation.

The Circuit Court of Appeals reversed the District Court on the question of damages and held that the *final damages* the libellants are entitled to are limited by an amount equal to the invoice value and that the *primary damages* were the difference between the price at which the sulphur was sold, $21 a ton, and the market price in June, 1898, $35 a ton, or $14, and therefore that the libellants were entitled to $14 a ton damages up to $6,925, the invoice value.

It matters not now what the parties thought were their rights under the bill of lading, nor what conclusions they alleged in their pleadings or arguments or what positions they took.

The damages are (disregarding at this moment the question of any invoice value or declared value limitation), the *loss of market* occasioned by the

fact that the market price in New York was $35 a ton (for best unmixed seconds, Parsons lot) in June, 1898, and $21 a ton when the sulphur finally arrived.

Smith vs. Tregarthen, 57 L. T., 58.

But, it must be borne in mind, the sulphur all this time belonged to and was the property of the libellant.

It was put overboard as their property (fol. 426), and it remained their property, and the suggestion that the Styria could have sold it at any time afterwards or disposed of it otherwise, and been liable for only the invoice value is preposterous, because, upon putting it overboard, any further disposition of it by the claimant would have been sheer larceny, for which even these bills of lading would not afford justification.

Therefore, we say, upon being discharged at Port Empedocle, the brimstone remained our property.

When the Styria sailed without the sulphur, the libellants became entitled to damages against her, but the sulphur was their sulphur and they could sell it in Sicily, or bring it here and sell it here, or keep it.

As to Parsons' lot, it appears from the stipulation of April 25, 1900, that his share of such expenses (including reloading, however) is $738.44. Therefore, under the decision, upon Parsons paying the necessary charges, he could have had his sulphur delivered to him at Port Empedocle, and he could have shipped it on the Abbazia and paid the freight and brought it on here and kept it, or sold it, say for $7,289.12 net.

That is just what was done, in a somewhat different way, for under the stipulation of August, 1898, the claimants paid the $738.44 (virtually),

reloading the sulphur on the Abbazia, and brought it forward, and it was sold for $7,289.12 net, leaving it to be decided, that the Styria was entitled to discharge the goods and to be repaid the $738.44, and that the libellant is entitled to damages for loss of market.

But the sulphur was always all this time the property of the libellant.

Now, let us look at the other side. The libellants were injured and damaged by the Styria's neglect to load and bring forward. They were injured and damaged by the *loss of market.* They were injured by a neglect of duty which arose *after* the discharge of the sulphur by the Styria, and by reason of which they suffered a money loss measured by the difference between the market price of the sulphur on or about June 5, 1898, of $35 a ton, and the market price when Abbazia brought it forward, $21 a ton.

Note that the libellant was not damaged $35 a ton, but the difference between $35 a ton and $21 a ton, the sulphur being all this time the libellant's property, to which or to the value of which he was always entitled.

Therefore, when the libellant sold his sulphur for $7,289.12 net, he merely sold his own property, to which he was entitled, and he still had his lawful claim for damages for loss of market at $14 a ton, less any charges, etc. to which claimant was entitled, without regard to the stipulation.

The Circuit Court of Appeals held the clause as to invoice value not to mean a valuation of the goods, but a mere final limitation of damages. In other words, then, the libellants are, of course, entitled to their sulphur and, in addition, to the difference between $35 a ton and $21 a ton for their damages for loss of market, such difference, however, not to exceed the invoice value of the sul-

phur, assuming that limitation to apply.

In other words, libellants were entitled to their sulphur and to $14 a ton up to $6,925, the invoice value.

And here is shown the true meaning and object of the stipulation of August, 1898.

The sulphur then lay in Sicily. The claimants had not filed their answers to the libels, nor brought their cross suits. Scopinich's deposition had then been taken, showing the conditions under which he discharged the sulphur and the notoriety of the proceedings to have sulphur go free. No claim had been made that this clause had any bearing (415-416).

The claimant was insisting that the sulphur was the libellants' sulphur lawfully discharged and bound under lien for expenses (pp. 225-227). Neither party cared to move in the matter. Hence they agreed: the claimant to get the sulphur out of storage and to earn the freight by bringing it over; the libellants to accept the sulphur *and to sell it forthwith* so as to fix a market price as an actual basis for measuring damages. It was not a necessary clause that the sulphur should be sold by the libellant, for the damages could be ascertained nearly as well without a sale, by evidence of the market value of the sulphur when the Abbazia arrived. The owners could have kept their sulphur and the market price could have been fixed by evidence of what it was on that day; but it was deemed best to make an actual sale and so fix the basis. The stipulation might have provided for a sale in Sicily, or *it* might have fixed a price as a basis for the measure of damages.

But that does not affect this proposition that the libellant is entitled to his sulphur or to its market price of $21 a ton fixed by actual sale on the arrival of the Abbazia and *also* to damages at the rate of $14 a ton for loss of market, less lawful expenses, etc.

As to Parsons' lot, therefore, the figures are:

Market value of sulphur ex "Abbazia" In September, 1898, less expenses of sale at $21 a ton.....	$7,289.12	
Market value in June, 1898, at $35.....	12,250.00	
Damages (which do not equal invoice value)		$4,960.88
Freight		528.00
Parsons is entitled to.....		$4,432.88

and interest from June 5, 1898.

The reason for calling for the market value of the sulphur in warehouse in Sicily immediately after the arrival of the Styria, was to use the figures as a basis of calculating the damages upon the supposition of a sale in Sicily at that date; then the matter works out this way: When the Styria sailed without the sulphur, the libellant might have at once directed the sale of the goods where they were and fixed his damages by comparing that price, $6,387.50, with the price in June, 1898, at $35 a ton, or $12,250.

The goods were ours, and we were entitled to them or their value, and also to our damages for loss of market.

Probably we were entitled to sell the goods there. As a general rule, a party is bound to do all he can to mitigate damages. Undoubtedly the libellants' notion was that the Styria's discharge of the goods was unlawful; that she ought to have waited for some definite outcome of the pending negotiations between Italy and Spain. Very likely they deemed that such supposed unlawful action was a technical conversion of their property; but the

claimant never admitted it. On the contrary, as already stated, it put the goods overboard as our property and claimed a lien upon them as our property, and stored them for our account.

Scoville *vs.* Griffith, 12 N. Y., 509.

Claimant might have sold under Italian legal process the sulphur for its lien, and, indeed, legal steps were taken to that end on its assumption that it (claimant) had no duty to bring on the cargo.

If claimant had sold the goods for $6,387.50, it would have deducted its expenses for unloading, storing, and legal charges, and would have been bound to pay us the balance, and, in addition, would have been liable to us for damages for loss of market at the difference between the price of the sulphur so disposed of in Sicily and $35 a ton.

But while the parties believed their rights to be so and so, neither agreed with the other. The stipulation was the joint act of sensible persons having in view (1) that the Courts should decide the rights of the parties; (2) that the claimant should earn its freight by bringing on the goods and preserve its alleged lien upon them for its lawful charges; and (3) that the libellants should accept the sulphur and sell it at once, and that the proceeds should be credited "on account of the damages," *i.e.*, in fixing the amount of damages, the fact that the libellants not only had their goods, but would sell them at a price to be settled by the action of a stipulation, should be taken into account. This was no more or less than the law itself provided.

Counsel said in his brief below:

"It was clearly intended that the stipulation should prejudice the rights of the parties to the extent that it varied them by its terms."

Possibly; yet it did not vary them in this particular, for it merely stated them as they would

exist without the stipulation, unless, indeed, counsel means that thereby his client was to get more or ours less than the law allowed, or *vice versa*. If that is his effort, which we cannot believe, then we can safely leave it to the Court.

The plain meaning of the stipulation is that the suit should be decided wholly without regard to the stipulation or anything done under it. It certainly does not mean that the parties intended to limit the Court in its decision or to interfere with the logical results thereof. It certainly was not intended to deprive the libellants of any damages or right of damages to which they were entitled outside of the stipulation. It clearly had no intention to affect the damages or right of damages beyond providing what the law itself sees to, that the fact that the sulphur itself or its proceeds was accepted and sold by its owner should be credited "on account of any damages" as the Court should find them.

Inasmuch as this libellant has always claimed the construction that this Court has put upon the invoice value clause, or that the clause had no application at all, it is hardly likely that he intended by the stipulation to present the claimant with the concession that the value of the sulphur *ex* "Abbazia" should be credited upon the invoice value as the primary measure of damages.

Claimant was not justified in discharging, nor in sailing without our goods. The consequent damages are for a loss of market, if not for a conversion or a total loss of the goods, no matter what the parties might have thought when the suits were tried. The Court of Appeals has declined to let the libellants part with their property so easily and has said that they ought to pay the expenses of discharging and also that it was their right to have the Styria reload and bring on the goods.

If the stipulation was executed without con-

sidering the possibliity of the case going off on the actual *ratio decidendi,* then it is unfair for claimant to attempt to enforce a term of it that was never intended to apply. If, on the contrary, the stipulation and each and every word thereof must be literally carried out, then the parties must be put into the contemplated situation. If claimant's counsel now insists that claimant had a right to take the libellants at their word, that claimant had converted the goods to its own use, then it follows that he is not entitled to take any advantage of the limitations of liability in the bill of lading, because he clearly cannot violate its terms and hold the other party bound to it. That being so, then for that reason if for no other, claimant was clearly chargeable with the full value of the sulphur at $35 a ton, and after crediting the amount received for the sulphur *ex* Abbazia under the stipulation, the balance of damages is the sum as found in the last preceding calculation, to wit, $4,960.88.

The proposition upon which claimant's counsel harps, that if the claimant had converted the shipment he would have been liable only for $6,925, the invoice price, is absurd for two reasons: (1) because the clause would never be applied if there had been a conversion or if the goods were never brought forward under the bill of lading; and (2) because the clause does not fix a valuation on the shipment, but only limits the final extent of liability for damages, if applicable at all.

You must first find the primary damages and then, if necessary, apply the final limitation.

If the claimant had converted our goods and then restored them to us, and we accepted them (fol. 119), he would be still liable for the loss of market, and we shall have had our goods. Thus Sedgwick on Damages, 8th Edition, Paragraph 494, says:

"Although the conversion generally deprives the owner of the property, it does not necessarily do so. It may on a return be accepted. In that case, of course, the measure of damages is not the whole value of the property, but compensation for the injury done to the property, which would usually be interest on the value of the property, together with the deterioration in its market value."

We respectfully submit, therefore, that there is nothing in the claimant's proposition if the principles enunciated in the decison herein are steadily borne in mind and followed.

The fallacy of the claimant's counsel is that he insists upon using the invoice value clause and the stipulation in the calculation of damages before their proper time. He insists upon using the former as a principle of law or as a factor in the decision of the question of the damages, instead of holding it back for final reference merely to keep the damages within the agreed limit. And he insists upon applying the value of the sulphur *ex* Abbazia under the stipulation after applying his invoice clause limitation, instead of *vice versa.*

The invoice value clause is not an agreed valuation of the shipment, but only a limitation of damages. It, therefore, is not a factor in the discussion of what the damages are; it is only useful if, indeed, involved in the case at all, to name the outside figure to which the damages (themselves fixed by rules of law) shall amount. It is not a guide or rule for arriving at the legal measure of damages. It does not affect principles of law or principles of decision. It may be said to limit the damages which the ship *shall* pay, not the damages she ought to pay. It is necessary, or useful, to refer to the limitation of liability, only to see how much the ship *shall* pay and only when the amount she ought to pay has been otherwise determined. It is utterly incorrect first to find a false rate of damages by cutting down the

amount that should have been received for the sulphur, by a premature application of the invoice value clause, and then finally bringing in the value of the sulphur *ex* Abbazia under the stipulation and still further reducing or wiping out the so-called damages. The only proper way, we respectfully submit, is primarily to charge the ship with the full amount which the sulphur ought to have brought at $35 a ton, to wit..... $12,250.00

Upon this to credit the value of the sulphur *ex* Abbazia, according to law and as per stipulation..... 7,289.12

$4,960.88

Less

Freight $528.00 528.00

Balance due libellant..... $4,432.88

with interest from June 5, 1898.

LAST POINT.

The judgment of the Court should award the libellant the net balance of the value of the goods at $35.00 a ton; less the proceeds of the goods *ex* Abbazia; and less freight. The charges for unloading, storing and reloading at Girgenti should not be allowed the claimant.

BOWERS & SANDS,
Proctors for Libellant Parsons.

JOHN M. BOWERS,
LATHAM G. REED,
Of Counsel.

Boxed 74 12981

No. 673. Curtis

Brief of Wadleigh for Respondent.

EVENING POST JOB PRINTING HOUSE, NEW YORK.

Office Supreme Court U. S.
FILED
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

Filed May 28, 1900.

ALFRED S. MALCOMSON

AGAINST

The Steamship "STYRIA," her engines, &c.

673.

AUSTRO-AMERICANA STEAMSHIP COMPANY

AGAINST

1,500 TONS OF BRIMSTONE, ALFRED S. MALCOMSON, owner.

ARGUMENT FOR LIBELLANT TO OPPOSE CLAIMANT'S APPLICATION FOR CERTIORARI.

The ship, having loaded libellant's goods, and given a bill of lading for them, unloaded them and sailed without them. Upon the arrival of the vessel the libel was filed to recover damages for this action. The goods were subsequently brought forward by another vessel, and upon their arrival a cross-libel was filed by the owners of the *Styria* to recover expenses of discharging, storing and reloading upon the vessel which brought them. The questions before the Court were, therefore, 1st,

whether the ship was in fault in discharging the goods; 2d, whether she was in fault in sailing without the goods; 3d, in either case what damages should be awarded to the libellant.

The District Court held the ship to be in fault, both in discharging the goods and in sailing without them. It therefore dismissed the cross-libel with costs, and rendered a decree for the libellant upon the libel, with costs, for damages, the amount of which was determined by the construction given by the Court to a clause of the bill of lading, which appears in the opinion.

All parties appealed to the Circuit Court of Appeals, where the case was again fully argued, and that Court unanimously affirmed the opinion of the District Court that the ship was in fault in sailing without the goods. It held, however, that the ship was not in fault in discharging the goods, and adopted a different rule of damages from that applied by the District Court. It therefore directed a decree for the cross-libellants for the expenses of discharging and reloading, and a decree for the libellant for the damages sustained by him, according to the rule adopted by the Court, and awarded no costs to either party.

A reargument was had, on application of the owners of the ship, which, however, involved no other point than the proper construction of a stipulation made by counsel, pending the litigation. On this reargument the Circuit Court of Appeals declined to disturb its former decision.

It thus appears that both the District Court and the Circuit Court of Appeals have held the ship in fault, after full argument upon the merits of the cause. The only modification of the decision of the District Court, upon the merits, made by the Circuit Court of Appeals was in favor of the ship. The District Court having found her in fault, both in discharging and in sailing without the goods, and having dismissed the cross-libel, and the Circuit Court of Appeals having found her not in fault in

discharging, although in fault in sailing without the goods, and having ordered a decree for the cross-libellants, this is a result of which the ship has no right to complain. The modification of the decree of the District Court by the Circuit Court of Appeals was, so far as the merits of the controversy are concerned, wholly in favor of the ship.

The only other question involved is one of damages. It did not affect the right of the libellant to recover, nor the obligation of the ship to pay damages, but only the amount of the damages to be so recovered and paid. This was, moreover, the only point of the reargument, as to the effect of the stipulation made pending the litigation; as to whether that would affect the amount of damages.

We submit that, under these circumstances, a *certiorari* ought not to issue. The ship has had the benefit of full trial and argument in two courts, and both those Courts have held her in fault; there has been no difference of opinion among the Judges upon that point. The only difference has been that the Circuit Court of Appeals found her less in fault than the District Court had. The questions of the amount of damages, or of the construction of the stipulation entered into pending the litigation are not, we respectfully submit, of such importance as to call for the intervention of this Court, nor to justify the issue of the writ. Where two courts have unanimously agreed in a conclusion as to the merits of the controvery, and where the only question on which they differ is one of amount of damages, we do not understand that it has been the practice of this Court to issue a *certiorari*, nor, we submit, is the question of sufficient dignity to call for the intervention of this Court, and the application should be denied.

~~Goepman & Cromwell,~~

W. J. Curtis

Proctors for Malcomson,
Libellant and Claimant.

Supreme Court of the United States.

The Steamship "STYRIA,"
ANTONIO G. SCOPINICH, Claimant,
Petitioner,

vs.

ALFRED S. MALCOMSON.

1,500 Tons of Brimstone, ALFRED S. MALCOMSON, Claimant,
Petitioner,

vs.

AUSTRO-AMERICANA STEAMSHIP COMPANY, owner of the Steamships "STYRIA" and "ABBAZIA."

No. 74.

On Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

BRIEF FOR ALFRED S. MALCOMSON.

Statement.

These are one of four libels and one of four cross-libels, filed in the District Court for the Southern District of New York, arising out of the same transaction. The libellants are all owners of different lots of brimstone, shipped by the steamship *Styria* at Porto Empedocle, Sicily, in the

month of April, 1898, and, the vessel not having brought over the brimstone, libeled her upon her arrival for damages resulting from her failure to bring it in accordance with the contract. Subsequently, by stipulation between the parties, the brimstone was brought over by the *Abbazia*, another steamer belonging to the Austro-Americana Steamship Company which is the owner of the *Styria*, and, upon its arrival here, was libeled by that company for expenses incurred in landing and storing it in Sicily. Decrees were entered in the District Court in favor of the libellants and cross-claimants, from which decrees the claimant and cross-libellants appealed to the Circuit Court of Appeals for the Second Circuit. The libellants being dissatisfied with the amount of damages awarded by the District Court, appealed from so much of the decrees in their favor as limited their recovery to the amount actually awarded.

The Circuit Court of Appeals reversed all the decrees, ordered decrees for the cross-libellants for expenses of discharging cargo, established a different rule of damages upon the libels from that laid down in the District Court and remanded the causes for further action in that Court in accordance with these decrees. Claimant then petitioned this Court for a *certiorari* which was granted and a like writ was issued respecting the suits on the cross-libels. Upon these writs the causes now come up.

There is no conflict of evidence in the case. The *Styria* is an Austrian steamer, owned by the Austro-Americana Steamship Company (Record, fol. 340). She sailed from Trieste on April 16, 1899, and arrived at Porto Empedocle, which is the port of Girgenti, early on April 21st (fols. 391, 392). She had brought little cargo from Trieste, and began taking on brimstone at Porto Empedocle in the afternoon of April 21st (fol. 394). She took on all the brimstone mentioned in the libels, and finished loading on Sunday, the 25th (fols. 395, 396). Bills of lading in the same form were signed by the captain for all the

brimstone (fols. 399–408), and the ship cleared at the Custom House at Porto Empedocle on Saturday, the 24th (fol. 409).

The ship, however, did not in fact sail, but landed the brimstone again and put it in warehouse (fol. 411). Notice was given to the shippers, stating that the brimstone was discharged on account of danger arising from the war then existing between Spain and the United States (fols 418-429). Notice was also given to the Austrian Consul, and to the Director General of Customs at the port (fols. 430–437). The unloading of the brimstone was begun on April 27th and completed on May 7th. It was stored in the warehouse of Zenobio Urso, which was selected by the ship's agent, and notice of its being put in store was also sent to the shippers (fols. 438–445). Protests were received from the shippers before the vessel sailed, which the master handed to his lawyer at Girgenti (fols. 446–447). The ship left Porto Empedocle on May 8th and went to Messina, where she shipped some fruit and sailed for Palermo. She left Palermo on May 9th and reached New York on June 3d (fols. 447, 448). The master's knowledge that brimstone was contraband of war was derived from the newspapers (fols. 448, 449). Before he left he was aware that there was an understanding between Rome and Madrid that it should not be treated as contraband of war (fols. 450–452).

The reason why the master landed his cargo was because he was instructed by Burrell & Sons, of Glasgow, whom he calls "the managing owners," to land it. He landed it only to carry out instructions, and testified: "I did not act on my own judgment" (fols. 456, 457). He supposed himself to be acting under the clause in the bill of lading which provides that "in case of blockade or interdict of the port of discharge, or if the master shall judge it unsafe to enter there, he may land the goods at such other port as he may consider safe" (fols. 459–

461). He never heard of any blockade of New York (fol. 462).

At the time when the *Styria* was at Porto Empedocle, the *Lord Warwick* lay alongside of her and was loading brimstone. She sailed before the *Styria* did (fol. 463). In fact, she arrived in New York on May 19th, and the brimstone was carried through and landed in New York. The *City of Truro* sailed about the same time from Licata, Sicily, with brimstone and arrived in New York on May 18th. The *Europa* also sailed with brimstone from Licata at about this time, and arrived on May 26th at Portland, Maine (fols. 722-728).

The master made no effort to find out whether he could carry the brimstone, nor to ascertain whether it was contraband of war (fols. 469, 470). He knew that brimstone was used to make powder, and so thought it must be contraband; and that was all that he knew about it. He knew of the efforts being made by the Italian Government to have brimstone not treated as contraband of war, and this suggested to him that it was contraband (fols. 471-473). His instructions from his owners came by telegraph. He had asked for no instructions and made no suggestion to them (fols. 495, 496). He heard that brimstone was not to be treated as contraband of war when he had about finished unloading. He looked at the newspapers, and spoke with the Austrian Consul, and had seen in the papers that brimstone was to go free (fols. 497-500). He had the same knowledge that brimstone was to be free as he had that it was contraband of war (fols. 500, 501). Without instructions from the owners, he would probably have sailed, but could not say positively (fols. 502, 503). He did not trouble himself any further about the question when he got his orders, because he was dependent on orders (fols. 507, 508). On the day when he sailed he saw a notice from the Austrian Consul to the *Styria's* agent to the effect that he had received a communication from the Prefect that it was agreed that sul-

phur should not be seized (fols. 522, 547–548). This was on May 7th, at about eight o'clock in the evening (fol. 535). He knew from the newspapers that brimstone was to be allowed to go free (fols. 549, 550).

Under stipulation between the parties, certain newspaper articles and letters were allowed to be read in evidence, and the Court was authorized to draw such inferences of fact therefrom as might seem to it warranted. It was also expressly stipulated that the newspaper items put in evidence by the libellants were read by the captain of the *Styria* (fols. 798–803). From these papers it appears that on April 25, 1898, the Queen Regent of Spain issued a proclamation of war, by which sulphur, among other things, was declared contraband of war (*Styria's* Exhibit E–T, pp. 217–19). It also appeared that, on April 29, 1898, a verbal communication was made to the Italian Ambassador at Madrid of the orders given commanders of Spanish ships not to molest cargoes of sulphur, and the official note confirming it was dated May 31, 1898 (Malcomson's Exhibit 18, p. 213). The newspaper articles read by the captain stated, in the issue of April 24–25, 1898, that negotiations were taking place for the purpose of obtaining the exclusion of sulphur from contraband of war. The issue of May 1st–2d stated that it was certain that the Spanish Government had ordered its commanders to allow brimstone to pass free. The issue of May 3d–4th stated that a circular had been sent by the Minister of the Interior to all Prefects in Sicily, informing them of this fact. The issue of May 5th–6th gave a copy of a telegram from the Minister of Agriculture to the Chamber of Commerce of Palermo, to this effect; and the issue of May 7–8th stated that the Prefecture had confirmed the intelligence. It does not appear that any effort was made by Burrell & Son, by whose orders the brimstone was landed, to ascertain whether or not it could be safely carried, until May 9th, the day after the *Styria* finally sailed

from Porto Empedocle, *two weeks after they had directed the captain to discharge.* Several telegrams and letters were put in evidence upon this subject on behalf of the *Styria*, but the earliest of them is dated on May 9th; and it is evident from its form that no previous inquiry had been made (*Styria's* Exhibits D 1–D 16, pp. 202–211).

On the arrival of the *Styria* in New York on June 3, 1898, the libels were filed. The master appeared as claimant and filed answer. Subsequently, on August 12, 1898, a stipulation was entered into between proctors for all parties, which provided that the claimant should forward the cargo landed *ex Styria* by the first available steamer to New York upon the same terms as in the original bill of lading, the consignees to receive it, pay freight, sell it at the current market rates, and credit the amount on damages, if any, recovered herein; and that the claimant might take proceedings to enforce his lien against the cargo for charges incurred in reloading and storing, if the ship's conduct should be held to have been proper; but it was expressly provided that the stipulation should be without prejudice to the rights of any of the parties (*Styria's* Exhibit C, pp. 197–8).

The learned District Judge found for the libellants and sent the cases to a Commissioner for the assessment of damages. The Court held, upon the question of damages, that, while the libellants were entitled to deduct freight, in estimating the value of the goods, they could recover in no case for anything more than the difference between the proceeds of the sale, less freight, and the invoice value of the goods, on account of the provision in the bill of lading that in no case should the shipper recover more than the invoice value of the goods, and because, by the stipulation entered into (Styria's Exhibit C), the goods had in fact been forwarded to New York and received by the consignees. He, therefore, held all evidence of the actual damage sustained by the libellants to be immaterial. The Commissioner made

up his reports upon this basis, and the libellants, considering the provision of the bill of lading as simply limiting a maximum of recovery, excepted to the reports, and appealed from so much of the decrees as limited the recovery to the amounts thus found due.

On the cross-libels by the shipowner against the sulphur for costs of discharging, storing, &c., decrees were entered dismissing the libels, with costs, and the claimant and cross libellant appealed from the decrees made both on the libels and cross-libels *in toto*.

The Circuit Court of Appeals, while finding the ship in fault, reversed the decree below as to damages, and held that the limitation of recovery, in the bill of lading, to the invoice value of the goods did not establish a basis for the estimation of damages, but only a limit upon the amount recoverable. The recovery of libellants, it was held, should be the difference between the market value of the goods when they should have arrived and their value when they did arrive, but the total recovery must not exceed invoice value. On reargument, the Court held that the stipulation did not affect this question.

On the cross-libels the Court held the ship justified in discharging the goods, and therefore reversed the decrees, dismissing the cross-libels, and held cross-libellants to be entitled to recover expenses of discharging, storage and reloading.

POINTS.

I.

The ship was in fault both in discharging the sulphur and in sailing without it.

Both the District Court and the Circuit Court of Appeals held the *Styria* to be in fault in sailing

without the sulphur, but they differed as to whether the discharging of the sulphur was justifiable. The District Court held the discharging of the sulphur to have been equally unjustifiable with the sailing without it; the Circuit Court of Appeals held that the discharge was proper but that the master should have reloaded the goods, and that his failure to do so and his sailing without them were improper. The importance of the difference lies wholly in its effect upon the cross-libels. The District Court dismissed the cross-libels, which were for expenses of unloading, storing and reloading the goods, because it held that they never should have been unloaded. The Circuit Court of Appeals reversed the decree of dismissal and decreed for the cross-libellant for these expenses, because they held that the master properly discharged the goods. We shall contend that the District Court was right in this respect and that the master had no right to discharge the goods. Many of the considerations which apply to one part of his conduct apply to all, and we shall first dwell upon these points, referring afterward to the considerations which bear especially upon his conduct in discharging the goods.

(*A.*)

The conduct of the master being based upon instructions given by Burrell & Son, and not upon his own judgment, is not within the provision of the bill of lading.

The provision of the bill of lading, under which the claimant attempts to justify the landing of the sulphur, is as follows:

> " In case of blockade or interdict of the
> " port of discharge, or if without such block-
> " ade or interdict the Master shall consider
> " it unsafe for any reason to enter or dis-
> " charge cargo there, he is to have the option

"of landing the goods at any other port which "he may consider safe, at shipper's risk and "expense" (fol. 31).

We do not concede that this clause justifies an abandonment of the voyage, nor that to reland the goods for which bills of lading had been given, without any new fact having arisen or come to the knowledge of the master which would justify him in considering the voyage unsafe, which he had shown himself to have considered safe by receiving the goods and issuing the bills of lading, could be justified under any circumstances. But in this particular case the further fact appears that *the master exercised no judgment whatever.* The bill of lading allowed him to land goods at some other port than that of destination "*if the master* "*shall consider it unsafe for any reason to* "*enter or discharge cargo there.*" This is the only exception, the only provision, under which claimant even pretends to justify the ship's conduct; but his own testimony shows that it is not sufficient for the purpose. The captain testified that he received the goods on board, issued bills of lading, and cleared at the Custom House for New York on April 24, 1898 (fols. 397-409). Evidently he was intending to sail, but he received instructions from Burrell & Son, whom he calls "the managing owners" of the ship, and, acting upon those orders *solely*, he landed the goods again and did not carry them. He says expressly that he landed the goods "*only to carry out instructions; that is all. I did not act on my own judgment*" (fols. 456, 457). The notice of landing given by him to the Austrian Consul states that he is discharging the ship "by order of the representative of my owners" (fol. 431). It is true that he says that he would not have sailed with such a cargo, because it was contraband of war (fol. 412), but he also says that he did not consider the question whether he should sail or not after he got

his orders, because he was dependent upon orders (fol. 508).

Thus it appears positively that it was not because he considered it unsafe to sail that the master landed the goods. Indeed, the fact that he had cleared at the Custom House for New York, before he received the orders, shows that he intended to sail with them. Had he had any idea of landing them, he would not have cleared. There is no question of any interdict or blockade of the port of New York; so that the whole defense rests upon the mere question of the master's judgment that the voyage was unsafe, and that judgment did not affect the result at all.

Upon the terms of the bill of lading, therefore, not only is the defense not made out, but it conclusively appears that it did not exist. The judgment exercised was not that of the master, but that of the managing owners; not that of people who were with the vessel and able to ascertain the various circumstances which would tend to affect the question of the safety of her voyage, but of people more than a thousand miles away, who knew nothing of the conditions actually existing.

It is through the master that a ship acts and speaks. He determines her conduct; and shippers have a right to rely upon his judgment and to expect that the action of the vessel will be determined by it. Managing owners or agents have no such position, nor is it reasonable that they should have. It is not possible for them to have the information necessary to enable them to form a proper judgment as to the action required. They are not mentioned in the bills of lading as persons whose judgment is to have any influence upon the conduct of the ship; and when they undertake to determine that conduct, they not only arrogate to themselves an authority to which they can have no proper claim, but they interfere with the proper and orderly direction of the vessel upon which shippers have a right to rely and do rely.

We submit, therefore, that, even if, in this case, the Court were of opinion that the circumstances were such as to justify the master in entertaining a reasonable apprehension of danger from the voyage, and in determining on that account not to enter upon it; and if a total abandonment of the voyage were to be held to be within the clause of the bill of lading upon which the claimant relies for justification; yet the landing of these goods, and the refusal to sail with them, was wholly without excuse. Whatever might have been the result if the master had exercised his judgment and acted upon his opinion, the fact is that he did not do so, and this fact makes it unimportant to speculate as to what he might have done if left to himself. We have already said that the fact that he loaded and cleared, knowing all the while every fact which he ever knew that would tend to make his voyage at all dangerous, and, under like circumstances, gave bills of lading, is a clear indication that he would have sailed but for the interference of the owners; and, although he contradicted himself as to what his course would have been if he had not been instructed, yet he testified that, *if the owners had not instructed him to discharge the sulphur, he would have sailed with it* (fol. 502).

It is a familiar rule that words of exception in any instrument are to be construed most strongly against the party for whose benefit they are introduced;

> *Palmer* vs. *Warren Insurance Company, 1 Story, 364;*

and this rule is applied to bills of lading

> *Compañia La Flecha* vs. *Brauer, 168 U. S., 104–118.*

The words of this exception therefore are to be construed against the ship; but no forced construction is needed. Unless they are to be extended in favor of the vessel into something entirely different from the words of the bill of lading,

they cannot possibly be made to cover the actual occurrence. For this purpose it would be necessary that the bill of lading should provide that "if the master *or the managing agent* shall consider it unsafe to enter or discharge cargo it may be landed." But that is not the language of the bill of lading, nor is there any excuse for reading it into the bill; and this being so, the action of the master, based solely upon the orders of the agents, was inexcusable. The learned District Judge held, and, we submit, correctly, that the master was not justified in acting upon these instructions (fol. 946). The Circuit Court of Appeals did not touch on the point.

Judged by the ordinary rules governing carriers by sea, the instructions of Burrell & Son furnish no excuse for a failure on the part of the ship to perform the contract of affreightment. Judged by the terms of the bill of lading, which is the utmost that claimant can require, or has set up, their action was equally unjustifiable and equally remote from furnishing any excuse for the landing of the goods. By either rule, therefore, the defense asserted wholly fails, and decree was properly made in favor of libellants.

(*B.*)

Whether based upon his own judgment or the instructions of Burrell & Son, the conduct of the master was not justified.

Even if it were to be admitted, which we most strenuously deny, that the instructions of the agents to the master could be an excuse for the vessel's action in discharging the cargo, yet, in considering the propriety or impropriety of the vessel's conduct, the circumstances must be taken into account. The agents can certainly have no higher powers or privileges than the master, and, since the circumstances as they existed at Porto Empedocle would be taken into account in determining the propriety of his conduct when based upon his own judgment, they

must be equally taken into account in determining the propriety of the agents' instructions, supposing that those instructions could have any force. The question would be whether, to the vessel lying at Porto Empedocle, and with the sources of information there accessible, there was such apparent danger as justified her in not sailing with the sulphur. Whether Burrell & Son were in fact informed of all the material circumstance, is not important. Their ignorance cannot excuse the ship if the master should have known. It may, indeed, be useful to note that Burrell & Son took no measures to inform themselves, acted recklessly, not only without proper investigation but without any investigation whatever, and simply disregarded entirely shippers' rights; but if, making all reasonable efforts to obtain information at Glasgow, where they were, they had not been able to learn material facts which were known at Porto Empedocle, and if these facts made the ship's conduct unreasonable, then the ship is in fault, and cannot be excused by the ignorance of Burrell & Son. The conduct of the vessel is to be determined by the same rule, whether based upon Burrell & Son's instructions or the master's judgment; and the question to be determined upon the point now under consideration is whether it was the duty of the vessel, in view of all the circumstances of the case, to have sailed with the cargo, even supposing that she might, under circumstances of actual hazard, have been justified in discharging. We submit that the evidence clearly shows her conduct to have been without excuse.

The only reason for not transporting these goods is the danger that they would be taken as contraband of war by Spanish cruisers. It is not suggested that any such cruisers were in the neighborhood of Porto Empedocle, but in her voyage to New York the *Styria* must necessarily pass close to the Spanish coast, and would, unquestionably, be in a position in which Spanish vessels could overhaul her if they

saw fit. That is, at some point a thousand miles away on her voyage the cargo might be taken. There was no nearer danger than this.

Now, in the first place, the risk to the ship was nothing. No penalty is imposed upon neutral vessels for carrying contraband of war. They may be subject to a slight detention while the contraband goods are removed, but no other or greater injury can befall them. The master of the *Styria* was informed by the protests of the shippers of this sulphur that they objected to its being landed and required him to proceed. Since no risk to his vessel was involved, and since the shippers of the sulphur had elected to take whatever risk there might be to the cargo, he had no right to refuse to proceed. He was not asked to endanger his vessel, and, in view of the attitude of the shippers, he had no further concern with the safety of the cargo.

In the next place, the risk, whatever it was, was not so imminent and immediate as to justify him in abandoning the voyage without leaving port. It will be admitted that he was not bound to proceed to certain capture, but the mere apprehension is not enough.

In

Dickinson vs. *Ritchie*, *10 East.*, *530*,

it was held that where a vessel, which was bound to carry a complete cargo of hemp and iron from St. Petersburg, left that port when half laden because of apprehension of an embargo, which was, in fact, afterwards imposed, she was in fault. Here there was no question of the capture of the vessel. There was no question of such detention as an embargo would cause, and the refusal to proceed had no justification.

We submit that the learned Circuit Court of Appeals was in error in considering the case cited not to be in point. The decision is that mere apprehension of danger is not enough. There the master acted from apprehension of embargo, which afterward proved to be well founded. Here he acted on

apprehension of a risk of capture, which proved to be unfounded. We submit that the same principle applies and that the case at bar is stronger than that cited.

In fact there was no reason for expecting any detention of or interference with the vessel. The master knew, before he left Porto Empedocle, that his cargo would not be molested. Extracts from the Sicilian newspapers have been put in evidence (fols. 853, 866), which it is stipulated that the captain read (fols. 801, 802), and which show that it was known to him that sulphur was not to be treated as contraband of war. He had even more positive proof than this, for he saw a formal notice given by the Austrian Consul to the ship's agents at Porto Empedocle, to the effect that sulphur would be allowed to pass free (fols. 531–532, 538–541). It is true that he had landed the goods, or some of them, before he learned definitely and in an official way that the Spanish Government had agreed not to interfere with their transportation, but he should not thus have landed them. He knew when he landed them that negotiations were proceeding, and it was his duty to wait a reasonable time for the removal of restrictions, which he had every reason to expect would be removed. Instead of doing so he began to unload at the first practicable moment after he had completed his loading, and, although he finished loading on the 24th and did not begin to unload until the 27th, he did not give notice to any of the shippers of his intention until after the unloading had begun. For this he does not even offer an excuse, nor is any offered in his behalf. But whether he had unloaded the goods or not, he certainly was not justified in sailing without them, when no reason for leaving them behind existed. Since he should not have been in such haste to unload them, he ought to have loaded them again and proceeded on his voyage. The fact that he had already put them in warehouse improperly is no excuse for leaving them there.

Much was said upon the trial of the so-called "unofficial" character of the agreement between Spain and Italy, and the master, in his testimony, though admitting that he exercised no judgment in the matter, at various times endeavored to justify the course pursued by the suggestion that the agreement was temporary and unofficial. Even if the agreement were of such a character as to call for the exercise of any judgment as to the extent to which reliance should be placed upon it, and if any one had exercised any judgment, which is not the case here, still the excuse would be insufficient.

By stipulation a number of papers (*Styria's* Exhibits D1-D16, pp. 202–12; Malcomson's Exhibits D17-D26, pp. 212–17; *Styria's* Exhibits E-T, pp. 217-19) were read in evidence, with the provision that the Court might "draw such inference of fact therefrom as may seem to it to be warranted" (fols. 798–803). From these papers certain facts appear not otherwise proved. It appears from *Styria's* Exhibits D1-D16 that Burrell & Son made their first inquiry to ascertain whether brimstone could be safely shipped on May 9, 1898, two days after the *Styria* had finally sailed from Porto Empedocle, and two weeks after they had, without inquiry, ordered her to refuse to carry these shipments. The result was that on May 10th (Exhibits D3-D4, p. 203) they were informed of the orders of the Spanish Government to its officers not to treat sulphur as contraband of war. This information reached them on the day after their first inquiry, so that it is evident that, had they attempted earlier to ascertain the true situation of affairs, they would have known that there was no risk in shipping or carrying sulphur. The statement that sulphur would not be treated as contraband was made to the British Ambassador at Madrid as early as *May 6th* (Exhibits D15, D16, pp. 210–1). The communication was made to the Italian Ambassador on *April 29th* (Malcomson Exhibit 18, p. 213), so that the *Styria* had made no considerable progress with unloading,

and would not have begun to unload at all, had reasonable prudence been shown, when the arrangement had been concluded which showed everything to be safe.

As to the master, he wholly neglected his duty, for he testifies that he made no attempt to obtain any information upon the subject, although he had learned from the papers that the question of not treating sulphur as contraband of war was under discussion between the Italian and Spanish governments, and was soon to be settled (fols. 469–475, 495–500); nor did he notify Burrell & Son of what he knew (fols. 577–578). In short, he deprived the shippers of every protection which, under maritime law, and the provisions of the bill of lading, they might expect from him. He did not inquire, he did not communicate even the information that came to him to the owners, and he acted blindly, without the least exercise of his own judgment, upon the orders of those owners, given in ignorance.

But in spite of the culpable neglect of the master to inform himself, he did have information of the whole course of events. It has been expressly stipulated that he read the papers from which the extracts (Malcolmson's Exhibits D19–D26, pp. 214–17) were taken, and he knew on *May 2d* that the Spanish Government had excluded brimstone from the list of articles contraband of war (Exhibit D23, p. 215); on the next day the news was confirmed (Exhibit D24, p. 216); on the next day he read in the paper the official telegram of the Minister of Agriculture to the Chamber of Commerce of Palermo (Exhibit D25, p. 216); and on the day on which he sailed he read a further confirmation (Exhibit D 26, p. 217). Nor was this all. *On the day on which he sailed he saw an official notice given by his Consul to the agent of the ship at Palermo*, to the effect that the two powers had agreed that sulphur should not be treated as contraband of war (fols. 531–534, 540–541, 547–550).

His duty under these circumstances was plain.

In view of the state of negotiations between the two countries, he had, as the learned District Judge held, no right to unload without waiting to ascertain a result which certainly must be reached within a day or two. Having ascertained, while in course of unloading, for he says he did not finish unloading until May 7 (fol 439), that there was no obstacle to his voyage, he should have ceased discharging cargo, should have taken aboard again what he had discharged, and should have made his voyage in accordance with his agreements.

The rule as to the conduct required of a master, in case of risk from war, is laid down in

The San Roman, L. R., 5 P. C., 301.

There the Court said that in order to justify a master in not proceeding there must be such danger of capture as would affect a man of "ordinary courage, judgment and experience." This is obviously the proper rule, and, applied to the case of the *Styria*, it shows that her conduct was unjustifiable. A man of ordinary judgment and experience would certainly not have begun to discharge his cargo, knowing what the master of the *Styria* did of the negotiations between the Italian and Spanish Governments.

Indeed, a man of ordinary courage, judgment and experience would have sailed with his cargo in any case, as the circumstances were. The record contains proof of the conduct of the other masters, who must be presumed to have been men of ordinary courage, judgment and experience, which shows this to be so. By the testimony of the master himself, the *Lord Warwick* lay alongside of the *Styria* at Porto Empedocle, loaded with brimstone, and sailed for New York before the *Styria* sailed (fols. 463–464). It is also proved without dispute that the *City of Truro* and the *Europa* sailed from Licata for New York and Portland, Maine, respectively, at about the same time (fols. 726–728), and that all these vessels arrived safely. Indeed, from the testi-

mony of the master of the *Styria* himself, it is plain that he intended to sail and would have sailed but for the officious meddling of Burrell & Son. There was, in fact, no risk at all at the time when the *Styria* left Porto Empedocle, and there was at no time any risk which any ordinarily experienced, prudent and courageous master would have taken into account. It may be doubted whether even Burrell & Son, had they known the facts as they were, would have given any such order as they did. It is to their ignorance and neglect to inform themselves that the whole trouble is due.

A sufficient test of the reasonableness and propriety of the action of the master and agents is found in the fact that subsequently, and on September 4, 1898, this same sulphur was loaded on the *Abbazia* (fol. 618) and brought forward to New York. The *Abbazia* belonged to the same owners as the *Styria*. There is no pretense of any other agreement between Spain and Italy, or any other power, with regard to sulphur, than that of April 29, 1898 (Malcolmson's Exhibit D18, p. 213). In transporting sulphur on the *Abbazia*, therefore, the company relied upon the security afforded by exactly the same state of circumstances which had existed before the *Styria* sailed from Porto Empedocle, and before she even finished discharging the sulphur; of which circumstances the master, as has been shown, had notice. The claimant is, therefore, compelled to maintain that the same state of facts which justified bringing the sulphur forward by the *Abbazia*, also justified a refusal to bring it forward by the *Styria*. The plain fact is that the agents did not take the pains to inform themselves of what they might have learned, what the master learned, and what everybody at Porto Empedocle knew. Had they learned these facts, they would undoubtedly have acted, when the *Styria* sailed, as they acted when the *Abbazia* sailed. Had the master, who had the knowledge which the agents lacked, been left to his own judgment, he would have sailed with the

sulphur, as the master of the *Abbazia* sailed. It is, we repeat, the ignorance of the agents, and their unwarranted interference with the master, and not any risk, real or reasonably apprehended, which is the cause of all the difficulty.

(*C.*)

The Master was in fault in unloading the goods as well as in sailing without them.

As has been said the District Court and the Circuit Court of Appeals differed as to whether the master was justified in discharging the goods, the former Court holding his action in this respect improper, while the latter considered it warranted by the circumstances.

The Circuit Court of Appeals said:

> "We should hesitate to hold that it was the duty of a master under similar circumstances to delay action on the expectation that a belligerent would voluntarily abandon one of its weapons, on no better assurance that such action would be taken than the statements of anonymous and irresponsible contributions to a newspaper published in a community which is extremely solicitous that such action be taken" (Record, p. 347).

The District Court said:

> "The discharge and storage of the cargo, however, was an act necessarily involving considerable expense to the shipper or consignees, and before imposing such an expense upon the cargo, the master in my judgment was bound in view of the daily reports of current negotiations and the expectations of the

exception of sulphur, to wait a reasonable period for satisfactory assurance in that regard" (Record, pp. 236–237).

We submit that the learned District Judge states the rule of conduct for the master which is applicable here.

Undoubtedly a vessel under such circumstances is not bound to wait indefinitely and wholly sacrifice the interests of the vessel to those of the cargo, but neither is he to be permitted to act hastily and without inquiry, and wholly sacrifice the interests of the cargo to those of the vessel. As was clearly laid down by this Court in a case cited by the learned District Judge,

The *Julia Blake*, *107 U. S.*, *418*,

he "must endeavor to hold the balance evenly" between ship and cargo. It is the application of this principle only for which we contend. We submit that it was wholly disregarded in this case.

The master testified that he cleared at the Custom House at Porto Empedocle on April 24th, having the sulphur then on board (Record, fol. 409). He did not sail, however, but landed it again (fol. 411). He began to discharge cargo on April 27th, and would have begun on the 26th, but that that day was rainy. He finished on May 7th and sailed on May 8th (fols. 515–516) He made no effort to ascertain whether he could safely carry the sulphur, though he knew that efforts were making by the Italian Government to induce the Spanish Government to exclude it from the list of articles contraband of war (fols. 469–473). He troubled himself no more about the question after he got orders to discharge (fols. 507–508). In fact, on May 2d he read in the *Giornale de Sicilia* the positive statement that sulphur was to be allowed to pass (fols. 859–860), and had he inquired he would have found that this was true, for the decision of the Spanish Govern-

ment was communicated to the Italian Ambassador on April 29th (fol. 851).

What the master's course would have been but for the orders of his agents cannot be known, but the fact is that, while he knew that efforts were making by the Italian Government to induce Spain to except sulphur from the list of articles contraband of war, and while it was reported that these efforts were probably to succeed, he waited not a day to learn the result. Even when he was informed, by the newspapers and by common report, that these efforts had succeeded, he made no attempt to ascertain what the fact was, but continued to discharge cargo. He did this because, having orders from his managing agents, he considered it to be his only duty to obey those orders.

The case of the managing owners is no better. They ordered the sulphur discharged as soon as war was declared, and without inquiry. *Their first inquiry or endeavor to inform themselves, of any sort, was made on May 9th, the day after the "Styria" had sailed, under their orders, without the sulphur, and ten days after all restrictions had been removed* (Record, fols. 805-806). Then they learned, what they would have learned when the *Styria* had hardly begun discharging, had they inquired, that sulphur was not to be treated as contraband of war (fol. 809). Such conduct is wholly inconsistent with any sense of duty to the cargo.

We contend, as we have said, that the terms of the bill of lading do not enable the vessel to escape liability because of any judgment of the managing agents, but only in case the *master* considered it unsafe to enter the port of destination; but even if the judgment of the managing agents could constitute a defense, it certainly can be put on no more favorable footing than that upon which the master's judgment would stand. The utmost that can be claimed for the ship is that it is immaterial whose judgment decided her action, and that the question must be whether that action was, in itself, proper.

Allowing this position, for the sake of argument, we submit that, whether the act of discharging the cargo at the earliest possible moment represented the result of the judgment of master or of managing owners, it was unreasonable and wrong. Sulphur was undoubtedly contraband, but vigorous efforts were known to be making by Italy to induce Spain to treat it otherwise. These efforts must either succeed or fail in a few days. In fact they succeeded, two days after unloading had begun. It was clearly greatly to the interest of the cargo that it should not be unloaded until it was certain that it could not safely be carried, and the cargo was at least entitled to *some* consideration. It received none. The work of discharging it was begun at the earliest possible moment and prosecuted diligently, without regard to any circumstances, until it was done. Was this "to hold the balance evenly between ship and cargo"?

Suppose that the master had been owner of ship and cargo, both, and had been hampered by no orders. He would probably have sailed, as he says that he should in this case, but for the orders of Burrell & Son (Record, fol. 502). But even if he had felt any apprehension, so that he was not willing to sail without further assurance, can there be any doubt, that, in what he knew to be the situation of affairs, he would have waited, at least a few days, would have inquired and informed himself, and would only have discharged his cargo when he had found either that it was not safe to sail, or that he must wait indefinitely to be sure? We submit that this would obviously have been the course of any one whose interest in ship and cargo was the same, and that this is the true test by which the master's conduct is to be judged. It is his duty to act as if the interests of the cargo were as important to him as those of the ship. But in this case the master did not even pretend to consider the interests of the cargo.

If the master had, in fact, made such reasonable

delay in discharging as he should, and had informed himself, as he should, of the progress and results of the negotiations between Spain and Italy, he would have learned, at least by April 30, that his cargo was no longer contraband, and would have sailed on April 30th or May 1st, instead of May 8th, as he did. The ship would have saved a week's time, the sulphur would have been brought forward, and no difficulty would have arisen. Surely a course which, in fact, would have proved thus beneficial to ship and cargo alike, and which could in no case have had any worse effect than costing the ship a delay of two or three days, is one not unreasonable for shippers to expect. The master owes some duty to cargo, and it is difficult to see what less he could have done, without, as he did, ignoring all duty.

We submit, therefore, that the learned District Judge was right in holding the discharge of the sulphur to have been "too hasty and precipitate," and that the learned Circuit Court of Appeals was in error in holding the master not to be bound to wait a reasonable time.

Upon the whole question of the ship's fault, we submit that:

First, the failure of the ship to bring forward the goods, being due to orders of the managing agents and not to any judgment of the master, is not within the clause of the bill of lading which claimant invokes, and can under no circumstances be justified by it.

Second, the discharging of the cargo while negotiations were known to be pending between Italy and Spain, which would make their carriage safe beyond question, and without any delay to learn the result of these negotiations, nor endeavor to ascertain that result, was wrong and unjustifiable.

Third, even if the discharge of the cargo were proper, the ship was in fault in sailing without the sulphur, after the master had

seen publication of an official notice from the Italian Government that it was not to be treated as contraband of war, and had heard read a formal notice to that effect from his Consul to his agents.

II.

The rule of damages upon the libel adopted by the Circuit Court of Appeals is the correct rule.

The question of damages upon which libellant appealed to the Circuit Court of Appeals was decided by that Court in his favor, and the error for which that Court reversed the decree of the District Court was an error on this point only. We submit that this reversal was proper, and that the rule laid down by the Circuit Court of Appeals was correct.

Were there no agreements or stipulations concerning damages in this case, no difficulty could arise on this point. The goods were not brought forward when they should have been, and were brought forward later, when their market value was much less. The difference between their value when they should have arrived and their value when they did arrive is, obviously, the true measure of damages.

But a provision of the bill of lading limits the damages recoverable, and the parties to the suit entered into a stipulation, after the libel was filed, concerning the forwarding of the goods, and these things were held by the District Court, and are contended by counsel for claimant to have the effect of so modifying what could otherwise be the rule of damages as to reduce any possible recovery by libellant to an insignificant sum.

We believe that neither the bill of lading nor the stipulation can have the effect for which claimant's

counsel contend and that the Circuit Court of Appeals was right in so holding.

(*A.*)

As to the limitation in the bill of lading upon damages recoverable.

The bill of lading contains, upon the subject of damages, this provision:

> "The shipowner is not to be liable * * * in any case for more than the invoice or declared value of the goods whichever shall be the least."

At first sight the meaning of these words seems plain. They establish a limitation of the amount which the shipowner may be called upon to pay. If the invoice or declared value of the goods is, say, $10,000, then the provision is as if it read, "The shipowner is not to be liable in any case for more than $10,000." The shipper or consignee may recover any damages which he can prove against him up to that amount, but that is the maximum. If the damages otherwise recoverable amount to more than that sum, still no more than that can be recovered, and for the rest the injured party is remediless. But until damages which exceed in amount the invoice or declared value are proved, this provision does not affect the matter at all.

So the learned Circuit Court of Appeals held, and, but for the decision of the learned District Judge, and the cases in the same Court and one in the District Court for the District of New Jersey which he cites, we venture to say that no doubt of the correctness of the holding would occur to any one. But these cases have given rise to an interpretation of this clause of the bill of lading which is not the natural one and which has the effect of making the clause practically a bar to the recovery of any substantial damages by a shipper who has been injured

by misconduct of the ship. Except in the District of New Jersey, and in the Southern District of New York, this interpretation has not, so far as we know, ever been followed or adopted, and in only three cases, even in these districts, has it ever been applied. It was first announced and applied in

The Hadji, 18 Fed. Rep., 459,

by the same learned Judge who decided this case in the District Court. In

The Lydian Monarch, 23 Fed. Rep., 298,

a case arising in the District of New Jersey, it was again applied, and subsequently in

Pearse v. *Quebec Steamship Company, 24 Fed. Rep., 285.*

In the other case cited for the claimant below,

The Alene, 23 Blatch., 335,

the only question concerning this clause was as to its *validity*. Its *construction* was not at all involved. The construction, therefore, of the clause in question, adopted by the learned District Judge in this case, rests solely upon the authority of two previous decisions of his own, and one of the late District Judge of New Jersey. This is its sole basis in precedent and we submit that it has even less in reason.

The learned District Judge held that the clause of the bill of lading in question fixed, not a limit upon the total amount which might be recovered, but a principle upon which any recovery was to be estimated. The rule which he deduced from this clause was that the value of the goods when they arrived was to be deducted from the invoice value, plus freight and charges, and the difference would be the only amount recoverable. This was in accordance with the decision in the *Lydian Monarch*, where the Court, after finding the ship in fault, directed that the proceeds of the goods when sold be deducted

from invoice value and that libellant have a decree for the difference; adding that if the goods brought invoice value, the libel must be dismissed.

This view, we frankly say, seems to us simply preposterous. Had not the learned Judges who decided the *Lydian Monarch* and *Pearse* v. *Quebec Steamship Company* actually held it, we should have thought it wholly impossible. The possible result contemplated by the Court in the *Lydian Monarch*—that, though the ship was in fault and the libellant damaged, the libel might be dismissed—appears to us a plain *reductio ad absurdum*. Nothing, surely, but the most imperative language would induce a court to sanction a rule which could lead to such a result. But not only is there no language here requiring such a rule, but we confess our inability to see how, from the actual language, the rule can possibly be drawn. All that the clause says is that the shipowner is not to be liable "for more than the invoice or declared value of the goods," *i. e.* for a greater *amount* than this value. The invoice or declared value is mentioned in no other way than as *limiting the amount* of liability, it has nothing to do with the method of *computing the amount*. So to interpret it, is to pervert its meaning and introduce terms not contained in the actual bill of lading.

What considerations led to the decision in *The Lydian Monarch* we do not know, for the opinion is silent upon the point here under consideration, announcing only the result. In the case at bar we learn from the opinion of the learned District Judge (Record, fol. 1177) that his reasons for his decision were as follows:

> "By the contract of the bill of lading the "invoice value is the basis of settle- "ment of any loss or damage; and a "construction seems to me impossible and in "fact absurd that would call for the same "payment on a partial loss as upon a com- "plete destruction of the goods."

As to the first of these reasons we believe that it is perfectly plain that the bill of lading does *not* make "the invoice value the basis of settlement." There is not one word in it of any such purpose. It merely makes the invoice value limit the total recovery. As to the second reason, drawn from the practical results of applying the words as they stand, we submit that it is no reason at all. It may perfectly well be that the shipper should, as in the case at bar, suffer damage from the ship's misconduct equal, or nearly equal, to the invoice value of the goods, without losing the goods. Any apparent incongruity in the fact that he would recover as much when he still has the goods as he would as if he lost them, is due to the fact that the bill of lading fixes an arbitrary limit to his recovery, and so forbids his being indemnified beyond that amount. But that he must suffer without redress in the one case is no reason why he should so suffer in all cases, and if his loss, however arising, is not in excess of the stipulated amount, it is no answer to his demand to say that he could have recovered no more had his loss been twice as great.

In *Pease* v. *Quebec Steamship Company* the same learned Judge rejected one proposed construction of this clause because

> "On every shipment, whether there was a loss or not, the carrier might, without accountability, appropriate to his own use enough of the owner's goods to reduce the aggregate value of what remained in the foreign market to the invoice value of the whole, a result destructive of all commerce, because enabling the carrier to appropriate all its profits" (24 Fed. Rep., 288).

It is strange that he did not see that precisely the same result would follow from the rule which he adopted, in the case of all goods shipped in bulk. In the case at bar, for example, where sulphur had,

substantially, doubled in value during the voyage, the carrier, had he brought the goods promptly forward, might here, under the rule laid down in the District Court in this case, have appropriated half the cargo without responsibility If anything were needed to condemn such a rule, this surely is enough.

The true construction of the clause in question is set forth in

Brown v. *Cunard S. S. Co., 147 Mass., 58.*

There the Court said, by Mr. Justice Holmes:

> "As we read the contract the damages are to be ascertained in the usual way by finding the difference in value between each package as damaged and the same undamaged, and these damages are to be paid by the defendants up to but not exceeding one hundred pounds, when the value is not declared, or, in this case, up to but not exceeding the invoice value. As the damage to plaintiff's walnuts did not exceed the invoice value, the defendants must pay the whole amount."

Of the decisions in *The Lydian Monarch* and *Pearse* v. *The Quebec Steamship Company*, the Court said: "We shall not criticise these decisions further than to say that if they are not distinguishable from the case at bar we cannot follow them."

We submit that the learned Circuit Court of Appeals was right beyond question when it said that this clause with respect to the shipowner's liability

> "is a simple and straightforward one; gram-
> "matically construed it fixes a final limit of
> "liability beyond which he shall not be re-
> "quired to respond; it does not profess to regu-
> "late the calculation by which a loss is to be
> "ascertained, if such loss is less than the
> "limit."

Any other construction would do violence to the language of the bill of lading, would deprive shippers of proper protection and would be an encouragement to dishonesty in carriers.

(*B.*)

As to the stipulation entered into by the parties in this case.

After the libels in these cases were filed and before the answers were interposed, the parties entered into a stipulation (Record, pp. 197, 198) to which the learned District Judge referred as an additional support for the conclusion reached by him as to the method of computing the damages, and upon which claimant's counsel based their whole contention on the reargument in the Circuit Court of Appeals. On this account it is proper to refer to it here, though we think that it is perfectly clear that, as the Circuit Court of Appeals held, this paper has no bearing on the point.

The portion of the stipulation upon which claimant's counsel relied is the first paragraph, which provided that claimant should forward the sulphur to New York by the first available steamer, on the terms of the original bill of lading, and consignees should accept it and pay freight; "the goods, upon arrival, to be sold at current market rates, and the proceeds, less charges incurred, to be credited on account of the damages, if any, recovered in these cases by the libellants." The second paragraph gave claimant a lien on the sulphur for expenses at Porto Empedocle if the ship should be held justified in reloading and storing the sulphur; and the third paragraph provided that "this stipulation and anything done by any party under it shall be deemed to be wholly without prejudice in the pending suits, except as herein provided."

Claimant's counsel contended below that this stipulation was a surrender by libellants of all claim

to substantial damages. Their position was that the only damages which libellants could recover, after receiving the goods, would be what they had suffered by the delay in delivery. These were the "damages recovered," and so, when libellants agreed that the proceeds of the goods should be credited on account of damages, they meant credited as against these damages which, under the bill of lading, could not exceed invoice value. The goods brought more than the damages thus estimated, and therefore, it was contended below, the libellants should recover nothing. Of course this result, that the goods brought more than net damages, must have been foreseen by libellants, and therefore, on claimant's position, libellants must have intended, by this stipulation, to give up all claims to damages. Claimant must say that this was libellant's intention, because the Court could not be asked to enforce a stipulation contrary to the intent of the parties making it, and no one could help seeing that, if such a construction of the stipulation were adopted, this result must follow. Yet to say that libellants did so intend is an absurdity.

But claimant's position is wholly preposterous, even if it were allowed that the Court would enforce against a party, so as to deprive him of his just remedy, a stipulation entered into with a wholly different purpose. Such a construction of this stipulation, as the Circuit Court of Appeals held, is not even possible.

When this stipulation was entered into, the sulphur lay in Porto Empedocle, and the carrier had declined to act under its bill of lading at all. The provisions of the bill of lading, therefore, were not in the case. Libellants might recover full damages for the value of the sulphur and for whatever else they had suffered. The ship was in danger of damages exceeding her total value. Under these circumstances the parties, by this stipulation, agreed to turn suits for damages from total failure to deliver into suits

for damages for delay. The libellants allowed the carrier to bring the goods forward under the same terms on which it had originally agreed to do so, and agreed to pay freight and to credit the proceeds of the goods against such damages as they originally were entitled to recover. That is, they agreed to eliminate any claim for the value of the goods, and to receive the goods in lieu of it. The position is perfectly simple and perfectly plain.

But claimant contended that he must be credited *twice* with the value of the goods—once to ascertain damages, and once as against the damages so ascertained. Upon what theory this can be claimed it is difficult to understand. The stipulation provided for a reduction of damages from those for total failure to deliver to those for delay on delivery. The libels having been filed for total failure to deliver, the stipulation took the damages which would be recoverable in that case, and set off against them the proceeds of the goods. In practice this amounted to simply disregarding any claim for the value of the goods, and considering only the other elements of damage. Therefore, in the decree rendered, the claimant had exactly the benefit of the stipulation.

Had not the learned District Judge, though casually, alluded to this stipulation, and had not the claimant apparently relied upon it so strongly below, we should have been content to leave this matter to rest on the opinion of the Circuit Court of Appeals on the reargument. We believe that it is sufficiently obvious that no party could be supposed to have intended by a stipulation to abandon his claim, that any construction of a stipulation which would have such an effect is impossible, and that, even if it were possible, no Court would adopt it. We believe that it is also plain that such is not the meaning nor effect of this stipulation.

III.

Upon the libels in chief the decree of the Circuit Court of Appeals should be affirmed with costs to the libellants; and upon the cross-libels the decree of the Circuit Court of Appeals should be reversed and the decree of the District Court affirmed with costs to the claimants.

EDWARD B. HILL,
WILLIAM J. CURTIS,
Of Counsel for Alfred S. Malcomson.

Office Supreme Court U.S.
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Clerk.

No. 75.

By Melville H. Regensburger for Respts

Supreme Court of the United States.

OCTOBER TERM,

Filed Nov. 25, 1901.

No. 75.

The "STYRIA," ANTONIA G. SCOPINICH,

Claimant, Petitioner,

vs.

JOHN MUNROE *et al.*

BRIEF FOR JOHN MUNROE et al.

STERN & RUSHMORE,
Proctors for JOHN MUNROE *et al.*
40 WALL STREET,
NEW YORK CITY, N. Y.

MELVILLE H. REGENSBURGER,
Of Counsel.

Supreme Court of the United States.

JOHN MUNROE *et al.*,
Libellants,

AGAINST

The Steamship "STYRIA," her engines, &c.,
Claimant.

AUSTRO-AMERICANA STEAMSHIP COMPANY, owners of the Steamships "STYRIA" & "ABBAZIA,"
Libellant,

AGAINST

100 Tons of Brimstone owned by John Munroe & Company,
Respondent.

Statement.

These cases have been certified to this Court by the Judges of the Circuit Court of Appeals for the Second Circuit.

The cases were in that Court, on the cross appeals of the libellants and claimant in the first above-entitled case, and on the libellant's appeal in the second case.

The questions involved in the two above-entitled cases are identical with those involved in the appeals now pending in this Court in the cases of

the steamship "Styria," Antonia G. Scopinich, against James L. Morgan *et al.*, Schuyler L. Parsons and Alfred S. Malcomson, and numbered on the present Calendar 72, 73 and 74. These four cases were tried together and the appeals were heard together and the decisions in the courts below applied to all the four cases.

Inasmuch as very full briefs have been submitted in three of these series of cases (Numbers 72, 73 and 74), upon both the facts and law we have decided not to swell the volume of the printed papers and are content to rest the appeal in our cases upon the briefs of our associates.

The judgment of the Court should award the libellants the net balance of the value of the goods at $35 a ton, less the proceeds of the goods ex "Abbazia." The charges for unloading, storing and reloading at Girgenti should not be allowed the claimant.

STERN & RUSHMORE,
Proctors for Libellants
John Munroe et al.

MELVILLE H. REGENSBURGER,
Of Counsel.

Office Supreme Court
FILED
NOV 5 1900
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900

No.

Austro-Americana Steamship Company
Libellant

against

Certain Consignments of Brimstone
(Four cross-libels to original suits against the steamship Styria)

} Nos. 474, 475, and 477.

PETITION FOR WRIT OF CERTIORARI

WING, PUTNAM & BURLINGHAM
BOWERS & SANDS
SULLIVAN & CROMWELL
STERN & RUBEMORE
Proctors for Claimants-Petitioners

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1900, No.

1

AUSTRO-AMERICANA STEAMSHIP COMPANY, owner of Steamships "STYRIA" and "ABBAZIA,"

Libellant,

AGAINST

3250 cantars of brimstone,
JAMES L. MORGAN *et al.*,
Claimants-Petitioners.

2

The Same

AGAINST

4550 cantars of brimstone,
SCHUYLER L. PARSONS,
Claimant-Petitioner.

Notice of Motion.

The Same

3

AGAINST

1500 tons of brimstone,
ALFRED S. MALCOMSON,
Claimant-Petitioner.

The Same

AGAINST

100 tons of brimstone,
JOHN MUNROE *et al.*,
Claimants-Petitioners.

4

SIRS:

Take notice, that the annexed petition for a writ of *certiorari* to the United States Circuit Court of Appeals

for the Second Circuit will be presented to the Supreme Court of the United States on Monday, November 5th, 1900.

New York, October 31, 1900.

Yours, etc.,

WING, PUTNAM & BURLINGHAM,
Proctors for Morgan.

BOWERS & SANDS,
Proctors for Parsons.

SULLIVAN & CROMWELL,
Proctors for Malcomson.

STERN & RUSHMORE,
Proctors for Munroe.

To Messrs. CONVERS & KIRLIN,
Proctors for Libellant.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1900, No.

AUSTRO-AMERICANA STEAMSHIP COMPANY, owner of Steamships "STYRIA" and "ABBAZIA,"
Libellant,

AGAINST

3250 cantars of brimstone,
JAMES L. MORGAN *et al.*,
Claimants-Petitioners.

The Same

AGAINST

4550 cantars of brimstone,
SCHUYLER L. PARSONS,
Claimant-Petitioner.

The Same

AGAINST

1500 tons of brimstone,
ALFRED S. MALCOMSON,
Claimant-Petitioner.

The Same

AGAINST

100 tons of brimstone,
JOHN MUNROE *et al.*,
Claimants-Petitioners.

13 PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of James L. Morgan *et al.*, Schuyler L. Parsons, Alfred S. Malcomson, and John Munroe *et al.*, claimants of the consignments of brimstone above mentioned, respectfully alleges as follows:

14 I.—The above-entitled suits were begun by cross-libels filed in the District Court for the Southern District of New York against certain consignments of brimstone, of which the petitioners were the owners and claimants.

The four original suits were brought by the respective petitioners against the steamship *Styria* to recover damages by reason of the failure of the steamship to bring forward to New York the above-mentioned consign-
15 ments of brimstone, which had been loaded on the *Styria* at Porto Empedocle, Sicily, in April, 1898.

The master of the *Styria* unloaded the brimstone at the port of shipment for alleged "facts of war" and sailed to New York with other merchandise. Subsequently, in September, 1898, the brimstone thus stored was carried forward to New York by the steamship *Abbazia* belonging to the same owner as the *Styria*, and there delivered to the petitioners under a stipulation.

16 II.—Thereupon, the libellant herein, the Austro-Americana Steamship Company, as owner of the steamships *Styria* and *Abbazia* filed cross-libels as aforesaid to recover charges incurred in unloading the brimstone from the *Styria*, storing it in Sicily, and reloading it upon the *Abbazia*.

III.—The District Court held that the master of the *Styria* was not justified in leaving the brimstone in Sicily, and gave decrees in favor of these petitioners in their original suits against the *Styria* for their dam-

ages, and dismissed the cross-libels in the four above 17
entitled suits.

From this decision the merchants (the petitioners) appealed on the question of damages and the ship owner appealed on the merits.

The Circuit Court of Appeals reversed the decrees of the District Court, giving the merchants their full damages and allowing the ship owner the proper expenses of discharging and re-shipping at Porto Empedocle.

18

IV.—On May 28th, 1900, the claimant of the *Styria* applied to this Court for a writ of *certiorari* in the four suits brought by the petitioners herein against the steamship *Styria*, and on October 15th, 1900, this Court granted the application and directed the issuance of a writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit.

V.—The suits against the *Styria* for damages, in which the writ of *certiorari* has already been granted, 19
and the cross-suits by the owner of the *Styria* against the original libellants arise out of the same transaction. The eight suits were tried together in the District Court, and the appeals taken therein were heard on the same record in the Circuit Court of Appeals.

The transcript of record on which the application was made to this Court by the claimant of the *Styria* contains the pleadings, proofs, and complete record of proceedings in the cross-suits, as well as in the original suits.

20

VI.—Your petitioners beg leave to refer to the certified copy of the transcript of record returned from the District Court to the Circuit Court of Appeals for the Second Circuit, and the record in the last named Court, which were duly filed with the Clerk of this Court on or about May 28th, 1900.

See Nos 300, 301, 302, 303 Oct. Term 1900.

VII.—In Hubbard *v.* Tod (171 U. S., 474) this Court has decided that where a case was brought up on *certiorari* from a Circuit Court of Appeals on petition of

21 one of the parties, it will pass only upon the errors assigned by the petitioner and will not consider errors assigned by the other party.

On the hearing of these appeals the petitioners desire to be heard in support of the assignments of error made by them below and for this reason make the present application.

Wherefore, your petitioners pray that this Honorable Court will cause a writ of *certiorari* to be issued, pur-
22 suant to the power vested in this Court by the judiciary act approved March 3, 1891, requiring said Circuit Court of Appeals for the Second Circuit to certify the whole record and acts to this Court for consideration, and that thereupon this Court will decide the whole matter in controversy between the parties.

And your petitioners will ever pray, etc.

JAMES L. MORGAN,
SCHUYLER L. PARSONS,
ALFRED S. MALCOMSON,
23 JOHN MUNROE & COMPANY,
By EDGAR LOCKWOOD.

Sworn to before me this 31st day of October, 1900.

TEN EYCK R. BEARDSLEY,
Notary Public,
N. Y. Co.

I hereby certify that I have examined the foregoing
24 petition and in my opinion it is well founded and is entitled to the favorable consideration of the Court.

HARRINGTON PUTNAM,
Advocate.

Supreme Court of the United States.

Nos. 72, &c.—October Term, 1901.

The Steamship "Styria," Antonio G. Scopinich, Claimant, Petitioner,
72 vs.
James L. Morgan et al.

The Steamship "Styria," Antonio G. Scopinich, Claimant, Petitioner,
73 vs.
Schuyler L. Parsons.

The Steamship "Styria," Antonio G. Scopinich, Claimant, Petitioner,
74 vs.
Alfred S. Malcolmson.

The Steamship "Styria," Antonio G. Scopinich, Claimant, Petitioner,
75 vs.
John Munroe et al.

On writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 19, 1902.]

Four libels in admiralty were filed in the District Court of the United States for the Southern District of New York against the steamship Styria, to recover damages for the failure duly to deliver at New York different lots of sulphur, owned by the libellants, shipped on board the Styria at Port Empedocle, the port of the town of Girgenti, in Sicily, April 21–24, 1898, and shortly afterwards relanded at the port of shipment because it had become contraband of war. The facts were substantially undisputed, and were as follows:

The Styria was an Austrian steamship, owned by the Austro-Americana Steamship Company, and Burrill & Sons of Glasgow were her managing agents. She sailed April 16, 1898, with some cargo, from Trieste via Sicilian ports for New York, and on April 21 reached Port Empedocle, Sicily, her second loading port. Her master began at once to load on board the sulphur in question, and by April 24 it was all on board, bills of lading therefor (containing the provisions copied in the margin*) had

*To be delivered at the port of New York, "restraints of princes and rulers or people" and other specified perils "excepted; with liberty (in event of steamer putting back to this, or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or transship the goods by any other steamer."

"In case of blockade or interdict of the port of discharge, or if, without such blockade or interdict, the master shall consider it unsafe, for any reason, to enter

been signed, and the vessel cleared from the custom-house, and ready to proceed on her voyage to Messina and Palermo for a cargo of fruit, and thence to New York.

In the mean time, unknown to the master, war had broken out between the United States and Spain. On April 20, Congress passed, and the President approved, the joint resolution recognizing the freedom and independence of Cuba, and demanding that the government of Spain relinquish its authority in the island and withdraw its land and naval forces. 30 Stat. 738. On the same day the Spanish minister in Washington demanded and received his passports. On April 21, the American minister at Madrid was informed that the diplomatic relations between the two governments were broken off, and he left that same day. On April 22, the first overt act of war, the capture of the Spanish merchant steamship, the Buena Ventura, was committed. *The Buena Ventura*, 175 U. S. 384. On April 25, Congress passed an act declaring that war had existed since April 21. 30 Stat. 364. On April 23, the Queen Regent of Spain issued a decree announcing the existence of war with the United States; authorizing the Royal Navy, "in order to capture the enemy's ships, to confiscate the enemy's merchandise under their own flag, and contraband of war under any flag," to exercise the right of search on the high seas and in the territorial waters of the enemy; including, under the denomination of contraband, "powder, sulphur, saltpetre, dynamite, and every kind of explosive;" and charging the Minister of State and the Minister of Marine with the fulfilment of this decree.

On April 23, the master of the Styria received a telegram from Burrill & Sons, her managing agents, directing him not to sail until further orders; and on April 25 another telegram directing him "to discharge whole cargo as quickly as possible." The master had by this time learned that war existed, and that sulphur was contraband. He knew that his course would take him within a few miles of the Spanish coast, in order to sight the light-houses; and he had seen in an Italian newspaper that Spanish men-of-war were looking for contraband goods, and that a sulphur ship had been taken. In obedience to the instructions from the managing agents, as well as because he saw in the newspapers that the sulphur was contraband of war and he considered it unsafe to carry it, the master began to reland the sulphur at Port Empedocle on April 27, and had it all unloaded and warehoused by May 7. At the beginning of the unloading on April 27, he gave notice in writing to the shippers, and to the

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or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense, and on the goods being placed in charge of any mercantile agent or of British consul, and a letter being put into the post-office, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the master and owners discharged from all responsibility."

consignees named in the bills of lading, that "on finding risky my passage to New York with the actual sulphur cargo, for facts of war," he was discharging the cargo for the account and risk of the shippers, "under care of the mercantile agent, Mr. William Peirce, depositing the same in the warehouses of Mr. Zenobia Urso here, and, if these are not sufficient, in the warehouses of the British consulate, faculty which I have in force in the bills of lading." On the same day, he gave notice in writing to the Austrian consul at Girgenti "that, by order of the representative of my owners, for facts of war," he was discharging and warehousing the sulphur from the Styria, for whom it might concern; and also gave notice in writing, through the Austrian consul, to the director general of the customs at Girgenti, that, having loaded the sulphur on the Styria, "and sulphur being declared contraband of war, war actually existing between Spain and the United States of America, in behalf of the present laws, I deem it in the interest of all whom it might concern to discharge the whole sulphur here on receiving the necessary permit from the customs;" and asking that duties might be remitted on reshipment. On April 30 and May 2, the shippers of the sulphur protested against the unloading; and on May 3 and 5, respectively, the master replied that he, "in discharging the goods, acted as was his right, and in the best interest of the goods, which is confirmed by the fact, published in the papers, and discussed in the Italian Parliament, that sulphur had been declared contraband of war by one of the belligerent powers." And at the conclusion of the unloading, on May 7, the master gave notice to the shippers that, as soon as they paid the expense incurred on their account, the sulphur would be delivered to them; and to the consignees that the sulphur was lying in the warehouses at Port Empedocle, at the risk and expense of whom it might concern.

The exportation of sulphur is one of the principal industries of the island of Sicily, and immediately after the declaration of war Sicilian merchants urged the Italian Government to request Spain to exempt it from the list of contraband. The Giornale di Sicilia, a newspaper of Palermo, each issue of which had a double date, and was read by the master of the Styria on the day of its publication, contained, according to the translations in the record, the following information on the subject: On April 24–25, 1898, it was stated that the merchants of Messina had requested their deputy in the Italian Parliament to urge the Government to induce Spain to exclude sulphur from being considered contraband of war; and that the deputy had been assured that the Minister for Foreign Affairs would telegraph to the Italian Ambassador in Madrid to obtain what was required from the Spanish authorities. On April 26–27, it was stated that Spain included sulphur in the list of contraband of war, and that the Italian Council of Ministers had decided to induce Spain to revoke

its decision. On April 27–28, it was stated that an Italian deputy had asked the Minister of Foreign Affairs in Parliament whether sulphur had been excluded from the list of contraband of war. On April 29–30, it was stated that the Spanish government had not yet pronounced itself upon the Italian demand to exclude sulphur from the list of contraband of war; that the Italian Ambassador had been promised an immediate decision; that the Spanish Minister of Marine seemed decidedly adverse to the demand; but that it was hoped it would be conceded. The paper of May 1–2 contained, under date of May 1, from an anonymous correspondent at Rome, these statements: "Although the official advice has not yet arrived, I assure you absolutely that the Spanish government has determined to exclude sulphur from the list of contraband of war. The Popolo Romano, confirming my information, says that the relative decree is imminent which has been provoked by the insistence of our ambassador in Madrid, who obtained from Sagasta that he should unite the Council of Ministers, in which, notwithstanding the opposition of the Minister of Marine, the opinion prevailed to exclude sulphur from contraband." "The Official Gazette will publish the decision regarding sulphur. Meantime the Spanish Government has already ordered the commanders of its ships to allow sulphur to pass free." The paper of May 3–4 contained, under date of May 3, from its Roman correspondent, this statement: "The Department of Foreign Affairs decided not to publish in the Official Gazette the Spanish Government's decision regarding the exclusion of sulphur from contraband of war. But the Minister of the Interior sent a circular to all the prefects in Sicily, informing them of the orders relative to the free navigation of cargoes of sulphur."

The Giornale di Sicilia of May 5–6, 1898, contained, under the heading "Sulphur is not War Contraband," the following: "From the Minister of Agriculture, Industry and Commerce, the following telegram has been sent: 'Chamber of Commerce, Palermo: I inform the Chamber of Commerce, for the useful information of merchants, that by the decree of April 23d of the Spanish Government are considered, as contraband of war, arms, projectiles, fuses, powder, sulphur, nitre, dynamite, explosives, uniforms, ornaments, saddles, engines for ships, derricks, screws, boilers, and all that is necessary for the construction, repair and armament of men of war. I would also state that, in consequence of our request, the Spanish Government has given notice to the commanders of its vessels to let sulphur pass free. THE MINISTER, COECO ORTU.'"

The master also testified that on the evening of May 7 he saw a notice from the Austrian consul, saying that there had been a communication from the prefect that it was agreed between Spain and Italy that the Spanish ships had instructions to let sulphur go free; but "it was not given officially, only a matter of verbal arrangement. Of course, the verbal arrangement you can't believe."

Early in the morning of May 8, the master sailed, without the sulphur, to Palermo, and thence to Messina, took on board at each place a cargo of fruit, and on June 3 arrived at New York. Soon after the arrival there, these libels were filed.

The Giornale di Sicilia of May 7–8, 1898, (which did not reach the master before he sailed from Port Empedocle,) contained, under the heading "The Exportation of Sulphur may be continued," the following: "The Prefettura also with its communication confirms to us that the exportation of sulphur, notwithstanding the Spanish-American war, may continue. Indeed, the Spanish Government has officially declared, in the circular to the commandants of their ships, that sulphur is not to be considered as contraband of war. An official and public declaration is lacking, but there is no doubt that sulphur will pass freely."

On May 10, 1898, the Foreign Office in London, answering a telegram from Burrill & Sons, wrote them: "Spanish Government state that decree already issued cannot be altered, but that as temporary measure Naval Departments have been ordered not to treat sulphur as contraband of war. They lay stress on the fact that the measure is temporary only."

It appeared from inquiries made by the Foreign Office in London, and by the American Embassy in Italy, in June and July, 1898, that the actual state of facts was as follows: The Spanish Minister for Foreign Affairs verbally stated to the Italian Ambassador at Madrid, on April 29, 1898, and to the British Ambassador at Madrid, on May 6, 1898, that, while the decree of April 23 could not be altered, orders would be given to the Naval Departments, as a temporary measure, not to treat sulphur as contraband of war. On May 31, 1898, the Spanish Minister, in a note to the British Ambassador at Madrid, stated that the treatment of sulphur as contraband of war would be temporarily suspended; that the orders which had been given to that effect would not be revoked without due notice; and that the eventual revocation of the orders would not, in any case, apply to vessels at sea in ignorance of it, while the necessary time would be given for the execution of pending contracts. It did not appear that Spain ever made any public announcement of the modification of her intentions in regard to the treatment of sulphur, or ever agreed to let sulphur go free permanently.

A vessel which lay alongside the Styria at Port Empedocle, loading sulphur, sailed before she did, and arrived at New York in safety on May 19. Two other vessels laden with sulphur came safely from the Sicilian port of Licata to the United States about the same time. And no sulphur ships were taken by Spain during the war.

Presently after the signing of the Peace Protocol between the United States and Spain on August 12, 1898, the parties to these cases stipulated in writing that the steamship company should forward the sulphur from Port Empedocle by the first available vessel to New York, and deliver it

to the consignees, upon the terms and for the freight specified in the original *bills of lading; that the sulphur, upon arrival,* should be sold at current market rates, and the proceeds, less charges incurred, be credited on account of the damages, if any, recovered by the libellants; that, if the Styria was justified in relanding and storing the sulphur as was done, the company should have a lien upon the sulphur for the charges against it in Sicily; and that, if it was not so justified, the sulphur should be free from any charges except freight.

Under this stipulation, the steamship company paid the expenses of storage in Sicily, and reloaded the sulphur and brought it to New York in its steamship Abazzia, sailing September 4, and arriving September 30, and there delivered it to the consignees, who paid the freight as agreed, and sold the sulphur at the current market rates. And the company filed cross libels for the charges in Sicily.

The District Court found for the libellants, holding that the discharge of the cargo was too hasty and precipitate, and not justified by the facts of the case; and entered decrees for the libellants in small amounts, and dismissed the cross libels. 93 Fed. Rep. 474; 95 Fed. Rep. 698.

Both parties appealed to the Circuit Court of Appeals, which held that the sulphur was rightly discharged, but should have been reloaded before the Styria left Port Empedocle; and entered decrees for the libellants for increased damages, and upon the cross libels for the expenses of unloading, warehousing and reloading in Sicily. 101 Fed. Rep. 728.

The cases were then brought to this court by writs of certiorari, granted on petitions of both parties. (179 U. S. 683, 685.)

Mr. Justice SHIRAS delivered the opinion of the Court.

The master of a ship is the person who is intrusted with the care and management of it, and the great trust reposed in him by the owners, and the great authority which the law has vested in him, require on his part and for his own sake, no less than for the interest of his employers, the utmost fidelity and attention. (Abbot on Shipping, 7th Am. ed. 167.)

It was well said by the District Judge in the present case, that "though exceptions noted in the bill of lading contemplate circumstances of war, and are therefore applicable in the extraordinary circumstances that arose, still the carrier is not thereby relieved from the duty of acting with reasonable prudence for the interests of all concerned. The master, as the agent of all concerned, is still bound to a prudent regard for the interests of the cargo, and must endeavor to hold the balance evenly between ship and cargo when their interests conflict."

"All will agree that the master must act in good faith and exercise his best discretion for the benefit of all concerned." (*New England Insurance Company* v. *The Sarah Ann*, 13 Pet. 400; *The Amelia*, 6 Wall. 27.)

The good faith of the master and his reasonable exercise of discretion must be considered and determined in the light of the facts in each particular case. The term *discretion* implies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of *discretion*, and yet discretion should not be a word for arbitrary will or inconsiderate action. "Discretion means a decision of what is just and proper in the circumstances." (Bouvier's Law Dict.) "Discretion means the liberty or power of acting without other control than one's own judgment." (Webster's Dict.)

Courts, in passing upon such questions, should endeavor to put themselves in the position of the actors in the transaction, and not be ready to find that the course actually pursued was blameworthy because the results were unfortunate; what those concerned have a right to demand of a master, when confronted with unexpected emergencies, is not an infallible but a deliberate and considerate judgment. Mere good faith will not excuse him, if his decision turns out to have been wrong, but the result is not always a true criterion whether a man pursued a prudent course or not. (*Holliday* v. *Henard*, 12 Wall. 254.)

Applying these principles to the facts of the present case, we have to inquire whether the conduct of the master of the Styria showed a reasonable exercise of judgment, having regard to the rights of the owners of the vessel and those of the several owners of cargo.

That the situation was a difficult one is obvious, and is shown by the fact that the learned judges of the courts below, though having the advantage of a full disclosure of the facts and of able discussion by counsel, disagreed on the critical question in the case, whether the master was right in deciding that it was his duty to reland and store the contraband goods.

As heretofore stated, the Styria was an Austrian steamship, owned by the Austro-Americana Steamship Company, and Burrill & Sons of Glasgow were her managing agents. She sailed April 16, 1898, with some cargo, from Trieste via Sicilian ports for New York, and on April 21 reached Port Empedocle, Sicily, her second loading port. Her master began at once to load on board different lots of sulphur owned by the libellants, and by April 24 it was all on board, bills of lading therefor had been signed, and the vessel cleared from the customhouse, and was ready to proceed on her voyage to Messina and Palermo for additional cargo of fruit, and thence to New York. On April 27, the master, having learned that war between Spain and the United States had broken out, and being aware that sulphur was a contraband article, began to reland the sulphur at Port Empedocle, and had it all unloaded and warehoused by May 7. He gave notice in writing to the shippers, and to the consignees named in the bills of lading, that, "on finding risky my passage to New York with the actual sulphur cargo for facts of war," he was discharging that portion

of his cargo. On the same day he gave notice in writing to the Austrian consul at Girgenti "that, by order of the representative of my owners, for facts of war," he was discharging and warehousing the sulphur from the Styria, for whom it might concern; and also gave notice in writing, through the Austrian consul, to the director general of the customs at Girgenti, that, having loaded the sulphur on the Styria, "and sulphur being declared contraband of war, war actually existing between Spain and the United States of America, in behalf of the present laws, I deem it in the interest of all whom it might concern to discharge the whole sulphur here on receiving the necessary permit from the customs;" and asking that duties might be remitted on reshipment. On April 30 and May 2 the shippers of the sulphur protested against the unloading; and on May 3 and 5, respectively, the master replied that he, "in discharging the goods, acted as was his right, and in the best interest of the goods—which is confirmed by the fact, published in the papers, and discussed in the Italian Parliament, that sulphur had been declared contraband of war by one of the belligerent powers." And at the conclusion of the unloading, on May 7, the master gave notice to the shippers that, as soon as they paid the expense incurred on their account, the sulphur would be delivered to them; and to the consignees that the sulphur was lying in the warehouses at Port Empedocle, at the risk and expense of whom it might concern.

As both the District Court and the Circuit Court of Appeals held that, within the provisions of the bills of lading, the master had the right to decide on the course to pursue, whether to discharge the sulphur, or to refuse to sail until there was some reasonable assurance of safety, or to immediately proceed on his voyage, it is unnecessary for us to discuss the meaning of the bills of lading in that regard, but only to determine whether the decision of the master, to discharge and warehouse the goods, was a reasonable exercise of the discretion vested in him.

The learned judge of the District Court held that, while the bills of lading contemplated circumstances of war and were therefore applicable, yet that the master's right under them could not be exercised without waiting a reasonable time to see whether the danger of continuing the voyage with the sulphur might not be removed by negotiation between the Italian and Spanish governments. He thus expressed himself:

"The sulphur being generally regarded as contraband of war, and also within the express terms of the Spanish proclamation, a voyage through the Mediterranean, past the coast of Spain and through the Straits of Gibraltar, would presumably be pecuniarily dangerous to the cargo, even though the vessel, as a neutral, might not be liable to condemnation as prize. In case of seizure, however, the shipowner would suffer from the considerable delay incident to the seizure, though she were ultimately released. Except, therefore, for the negotiations immediately entered in for procuring an exception of sulphur from contraband, I have no doubt that it would

have been both the right and the duty of the master, for the interests of the cargo as well as of the ship, to refuse to sail with this cargo after clearing on April 24, until there was some reasonable assurance of safety. See *The San Roman*, (L. R. 3 Adm. & Eccl. 583,) when there was a delay of three months. The discharge and storage of the cargo, however, was an act necessarily involving considerable expense to the shipper or consignee; and before imposing such an expense upon the cargo the master, in my judgment, was bound in view of the daily reports of current negotiations and the expectations of the exception of sulphur, to wait a reasonable period for satisfactory assurances in that regard. . . . I must find, therefore, that the ship was not justified by clauses (a) and (b) of the bill of lading in discharging and storing the cargo on account of the shippers, as she did, between April 27th and May 7th; that by the 10th of May there was reasonable assurance that it would be safe to go on with the voyage, and that this was not an unreasonable time for the ship to wait under the facts and circumstances currently known in Sicily at that time." (93 Fed. Rep. 474; 95 Fed. Rep. 698.)

The Circuit Court of Appeals took a different view of the duty of the master to suspend his voyage and await the uncertain results of the rumored negotiations, and held that he had a right to unload the cargo of sulphur when he did. The following quotations sufficiently show the reasoning of the court:

"It seems manifest that, upon the outbreak of war, a voyage with contraband on board to the port of one of the belligerents might fairly be regarded as a risky piece of business. The suggestion made upon the argument that the naval power of Spain was not such as would induce a man 'of ordinary courage, judgment and experience' to hesitate to proceed, is of no weight. We may not attribute to the captain of the Styria knowledge gained after the event; and indeed this court is not advised of any historical facts which would warrant the conclusion that it was not entirely within the power of Spain, during the first few months of the war, to arrest and search every vessel westward bound through the Straits of Gibraltar, and picking her way along by the lighthouses on the Spanish coast. . . . We do not find it necessary to discuss this branch of the case, because we find in clause (a) abundant authority for a refusal to carry forward the sulphur, while such a condition of affiairs existed as that already described as being generally known to exist, when the discharge began on April 27. There is no logical difference between a restraint of princes and rulers exercised by a cruiser, with power to visit, search and seize, lying two leagues off Port Empedocle, and that exercised by a half dozen cruisers patrolling a narrow strait through which, if the voyage be made, the vessel must pass. Under such circumstances the owner of contraband cargo, loaded as this was before war broke out, could with reason insist that it would be gross negligence on the part of the ship to bring his cargo forward. Moreover, it would certainly be unreasonable to require the ship to remain in port with the contraband cargo on board until the war should cease, a period of months, possibly years. The owners of other cargo not contraband have rights as much, if not more, entitled to consideration than those of the owners who have been unfortunate enough to ship the cargo which has produced the risk. . . .

Inasmuch as the master, where the contract was made in times of peace, could properly decline to carry forward a cargo which by the subsequent breaking out of war had become contraband, we fail to see why he should not have the right to land such contraband cargo, with all proper precautions as to safekeeping, thus leaving his ship free to discharge its obligations to innocent cargo without risk or delay by reason of an actual arrest, which would be caused only by the presence of such contraband cargo. The ship made no contract to carry contraband of war to the port of a belligerent, and should not be held to the obligations of a contract into which she has never entered. We understand that the District Court reached this same conclusion, but found the ship in fault because she did not wait a reasonable period to see if there might not be some reasonable assurance of safety, and held that 'the commencement of the discharge on the 27th was too hasty and precipitate.' This brings us to the next branch of the case.

"When two nations formally proclaim the existence of a state of war between themselves with all the solemnity observed in this instance, it would seem to be going too far to say that parties whose contracts are affected thereby should wait some indefinite time, which a court shall find reasonable, in a vague expectation that the belligerents may think better of it and make peace. A situation is quite conceivable, where delay might fairly be required. Thus the minister of one power or the other might demand his passports, or the day named in an ultimatum might pass without compliance with its requirements; or a squadron of the war vessels of one power might impress seamen from the deck of the war vessel of another power, as the Carnatic and her consorts did with the Baltimore in 1798, or the war vessel of one power encountering the war vessel of another upon the high seas might pour broadside after broadside into her, as the Leopard did with the Chesapeake in 1807—any one of which acts would seem to import the imminence if not the actual existence of war, and yet might fall short of being such authoritative evidence of a state of belligerency as would justify a master in treating any part of his cargo as being thereby made contraband. But the situation shown here was a very different one; both nations had united in proclaiming to the whole world that they were at war, and we know of no reason why the master of any vessel of a neutral nation was bound to wait twenty-four hours, or twenty-four days or twenty-four weeks, to see if the two belligerents would not settle their differences.

"As soon as he learned that war was declared the master knew that the cargo he had taken on board at Port Empedocle was contraband. 'I knew,' says he, 'that sulphur is to make gunpowder; everybody knows that. . . . I thought it must be contraband.' We should have some doubts as to the efficiency of a master for international commerce who did not know that sulphur was contraband of war. It certainly should be a safe assumption for the master of a neutral vessel to make that he cannot carry such cargo to the ports of one belligerent without risking its seizure by the other. And, in the absence of special circumstances, there would seem to be no necessity to wait for further assurance in that regard. In the case at bar, however, there were special circumstances which will be next considered.

"The exportation of sulphur is one of the greatest industries of the island of Sicily, and the Italian government was naturally solicitous that the trade in sulphur with the United States should not be interfered with.

It now appears in the record, by reports obtained from diplomatic sources, that shortly after the proclamation of the Queen Regent negotiations were opened by the Italian government to secure a modification of its provisions so that sulphur should not be considered contraband of war. The Spanish government declined to alter the decree, but on April 29, at Madrid, the Spanish Minister of Foreign Affairs 'verbally' [*sic:* orally?] stated to the Italian Embassador that orders would be given to the Naval Departments, as a temporary measure, not to treat sulphur as contraband of war. The same statement was made by the Spanish Minister for Foreign Affairs to the British Ambassador on May 6. On May 31 the same Minister stated in an official note to both the Italian and the British Ambassadors that the treatment by Spain of sulphur as contraband of war would be temporarily suspended, and that the order which had been given to that effect would not be revoked without due notice.

"Not being in telephonic communication with the chancellery of the embassy at Madrid, the master of the Styria was not advised of these transactions at the moment they occurred. And his conduct is to be judged not in the light of exact knowledge acquired after the event, but by such information as may have been available for him at the time and place. As we have seen, he knew certainly on April 27, and probably on April 26, that war had been declared, and that his sulphur cargo was contraband; that he was, therefore, entitled to land and store it, thus leaving his ship free to carry out her obligations to the rest of the cargo. On April 25 the Giornale di Sicilia, a newspaper published at Palermo, and which the captain saw from day to day, stated that Messina merchants had asked their Parliamentary deputy to urge the government to co-operate to exclude brimstone from being considered contraband. From day to day thereafter the paper was filled with reports and rumors as to the progress of this movement to secure exemption. But down to the 6th of May not one of these reports bore the stamp of authority; no one vouched for their accuracy. The statements in the clippings from the newspaper which have been printed in the record are merely the expression of the beliefs and expectations of its correspondents in Rome, or elsewhere furnishing copy to a paper published in a community where an intense interest was felt in having sulphur exempted. There was no reason why it should be exempted; it is a variety of merchandise such as always has been contraband, its exportation to the United States might well be considered an 'aid' to Spain's enemy; no one appears to have suggested that the United States concede the same exemption. On the one hand it might be urged that it would please the government and people of Italy to grant the request, but on the other hand, in the case of merchandise so highly contraband, neither the Italian government nor people could justly take offense, if Spain should insist on exercising the rights which international law accords to every belligerent. Enlightened by the information now made known, we can see that the hopeful prognostications of the writers for the Journal of Sicily were well founded, but there was nothing to give any such assurance at the time they appeared. We should hesitate to hold that it was the duty of a master under similar circumstances to delay action on the expectation that a belligerent would voluntarily abandon one of its weapons, on no better assurance that such action would be taken than the statements of anonymous and irresponsible contributors to a newspaper published in a community which is extremely solicitous that such action be taken." (101 Fed. Rep. 728.)

We concur in these views of the Circuit Court of Appeals and in the conclusion thereby reached, that the master of the Styria was justified in relanding and warehousing the contraband portion of his cargo, and that in so doing he had reasonable regard for the interests of both ship and cargo.

Several leading authorities are cited on this branch of the case in the brief for the Styria, and which we shall briefly notice.

Geipel v. *Smith*, (L. R. 7 Q. B. 404,) was a case where the defendants had agreed to load a cargo of coal in England and sail to Hamburg. After the charter party had been made war broke out between France and Germany, and the port of Hamburg was blockaded by the French fleet. The defendants refused to carry out the charter party, relying on an exception of restraints of princes and rulers. It was held that they were justified in their refusal. And as to the contention that the defendants were bound to be in readiness to carry the cargo as soon as the blockade should be raised, Cockburn, C. J., observed:

"But it would be monstrous to say that in such case the parties must wait, for the obligation must be mutual, till the restraint be taken off—the shipper with cargo which might be perishable or its market value destroyed—the shipowner with his ship lying idle, possibly rotting;" and Lush. J., said: "A state of war must be presumed to be likely to continue so long and so to disturb the commerce of merchants as to defeat and destroy the object of commercial adventure like this."

In *Nobel's Explosives Co.* v. *Jenkins*, (2 Q. B. 326,) the plaintiff's goods, which were dynamite and contraband of war, had been placed upon a general ship of the defendant for carriage from London to Yokohama, a bill of lading containing similar clauses with those in the case of the Styria. The ship also contained non-contraband goods belonging to other shippers. In the course of the voyage she arrived at Hong Kong, and while there war was declared between China and Japan. There were at the time Chinese war vessels in and around the port of Hong Kong, and it was found that if the master had attempted to sail thence with the plaintiff's goods on board there would have been danger of their being seized and confiscated. The master cabled to his owners for advice, and they instructed him to land the cargo at Hong Kong. This was done. The plaintiffs forwarded the dynamite by another steamer several months later, and then brought an action to recover from the defendants the amount of freight which they had to pay for so forwarding, and also for the other expenses for relanding and reshipping the cargo at Hong Kong. The opinion of the court, delivered by Matthew, J., is so pertinent to our case that we extract a considerable portion of it:

"The main ground of defense was the exception in the bill of lading of 'restraint of princes, rulers or people.' A large body of evidence was laid before me to show that if the vessel sailed with the goods on board she

would, in all probability, be stopped and searched. It was certain in that case that the goods would have been confiscated, and quite uncertain what course the captors would take with the ship and the rest of the cargo. I am satisfied that if the master had continued the voyage with the goods on board he would have been acting recklessly. It was argued for the plaintiffs that the clause did not apply unless there was a direct and specific action upon the goods by sovereign authority. It was said that the fear of seizure, however well founded, was not a restraint, and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel* v. *Smith*, (L. R. 7 Q. B. 404,) and *Rodoconachi* v. *Elliott*, (L. R. 9 C. P. 518.) The goods were as effectually stopped at Hong Kong as if there had been an express order from the Chinese government that contraband of war should be landed. The analogy of a restraint by a blockade or embargo seems to me sufficiently close. The warships of the Chinese government were in such a position as to render the sailing of the steamer with contraband of war on board a matter of great danger, though she might have got away safely. The restraint was not temporary, as was contended by the plaintiffs' counsel. There was no reason to expect that the obstacle in the way of the vessel could be removed in any reasonable time. I find that the captain in refusing to carry the goods farther acted reasonably and prudently; and that the delivery of the goods at Yokohama was prevented by restraint of princes and rulers within the meaning of the exception.

"But, apart from the terms of the bill of lading, it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. Whether he has discharged that duty must depend on the circumstances of each case, and here, if the goods had been carried forward, there was every reason to believe that the ship would be detained and the goods of the plaintiffs confiscated. In the words of Willes, *J.*, in *Notare* v. *Henderson*, (L. R. 7 Q. B. 225, at p. 234,) 'a fair allowance ought to be made for the difficulty in which the master may be involved. . . . The place, the season—the opportunity and means at hand, the interests of other persons concerned in the adventure and whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay and inconvenience must be taken into account. I am of opinion that the course taken by the captain in landing the goods and landing them in safe custody was a proper discharge of his duty. It was said that the master was not an agent for the shippers, because they had protested against the discharge of the goods. But even if this information had reached the captain, it would not have divested him of his original authority and discretion as agent in any emergency for the owners of the ship and the other owners of the cargo."

A suggestion of the District Judge, and repeated in the argument for the libellants, to the effect that the master was guided in his action in discharging the contraband cargo by a telegram from Burrill & Sons, the managing agents in London, rather than by his own judgment on all the circumstances known to him at the time; that if he had been left to exercise his own judgment, he would not have discharged the cargo, especially not at the time he did, does not appear to us to be supported by the testi-

mony of the captain, which is the only evidence on the subject. It is true that he did state that he acted under instructions of the agents, but he also said, in reply to questions put on cross-examination, as follows:

"Now, Captain, you say that you put this brimstone ashore on instructions of the managing owners? Answer. Yes, and also because I knew that the war was there, and I acted on the bill of lading clause. Question. You have testified, haven't you, that all this you did by orders? Answer. No. The principal reason was because I was ordered; and, secondly, that I had the bill of lading clause that fully authorized me when I deemed it not safe to proceed with the cargo that was declared contraband of war."

Without transcribing all of the master's testimony, but having read and weighed it, we are of opinion that it clearly shows that, while he carried out the instructions of the agents, his judgment, on the facts confronting him, was that it was not safe for him to proceed with a contraband cargo, nor proper to await indefinitely for the uncertain results pending negotiations between Italy and Spain. His conduct, as we have already said, had due regard to the interests of all concerned in the ship and in the cargo, both that which was contraband and that which was not so. So far as the shipowners were concerned, he had the approval of the managing agents; so far as the shippers and consignees were concerned, he acted upon his own judgment, exercised, apparently in good faith, on their behalf. In the case of *Nobel's Explosives Co.* v. *Jenkins*, just cited, the same facts appeared, namely, that the master consulted the owners of the ship before he acted, but also acted in reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. The master, in either case, would have acted imprudently if he had not secured the approval of the shipowners, if it were possible to get it before the emergency was over; and that all that can be said is, that there was a concurrence of judgment between the ship agents and the master as to what was the proper course to pursue.

But, while we concur with the conclusion of the Circuit Court of Appeals, that the master acted discreetly in landing and storing the contraband portion of the cargo when and as he did, we cannot accept the other conclusion of that court that, in the subsequent circumstances, it was the master's duty to reship the cargo and resume his voyage with the sulphur on board. Indeed, the facts and reasoning which brought the court to its first, seem to us to be quite inconsistent with its latter, conclusion. In its opinion, heretofore quoted, the court said that it was not the duty of the master "to delay action on the expectation that a belligerent would voluntarily abandon one of its weapons on no better assurance that such action would be taken, than the statements of anonymous and irresponsible contributors to a newspaper published in a community which is extremely solicitous that action be taken." Yet the court thought that, on May 6, the situation had changed, and that the publication in a newspaper, purporting to be from the Italian Minister of Agriculture, Industry and Com-

merce, that the Spanish government had given notice to the commanders of its vessels to let sulphur pass free, was an official declaration, upon the strength of which the master ought to have reshipped the sulphur. That publication, under the date of May 5 and 6, was as follows: "Chamber of Commerce, Palermo: I inform the Chamber of Commerce, for the useful information of merchants, that by the decree of April 23 of the Spanish government, are considered as contraband of war, arms, pr
powder, sulphur. . . . I could also state that, in conse
request, the Spanish government has given notice to the
its vessels to let sulphur go free."

The publication of May 7 and 8 was as follows: "The prefettura, also, with its communication confirms to us that the exportation of sulphur, notwithstanding the Spanish-American war, may continue. Indeed, the Spanish government has officially declared in the circular to the commandants of their ships, that sulphur is not to be considered as contraband of war. An official and public declaration is lacking, but there is no doubt that sulphur will pass freely."

It must be observed that these assurances did not come from any Spanish, but from Italian sources. It was for the interest of the Italians to continue to export sulphur, and to give the impression that it could be done with security to the carrying vessels, and all statements from Italian sources must be weighed with reference to that fact. In the meantime, on May 7, the Styria had sailed, and the master testified that when he was clearing the ship to leave on the 7th of May that he saw a notice from the consul to say that there was a communication from the prefect that it was agreed between Italy and Spain that sulphur would not be taken, that Spanish vessels had instructions to let it go free, saying: "It was not given officially—only a matter of verbal arrangement. Of course, the verbal arrangement you cannot believe." "On the 7th, in the evening, about eight o'clock, and I already had my clearances." And he further testified, in reply to a question by libellant's counsel, as follows: "Question. But the day before you sailed, on the 7th, you did read in the papers that the governments had come to an agreement—to an understanding? Answer. Yes—not to an understanding, not to a safe understanding, but a temporary understanding, you know. Question. To the effect that sulphur temporarily would not be treated as contraband of war? Answer. Yes. Question. In spite of the previous proclamation, was it not? Answer. Yes, but the papers said, not officially confirmed, you see. That meant, of course, they could withdraw it at any moment. Question. The newspapers in which you read about these things, were what papers? Answer. I could not tell you. I believe the Sicilian Courier; I don't know; something like that; the paper published in Palermo—the largest paper published in Palermo."

From this it appears that when the Styria sailed on the evening of May 7 the only information that the captain had was that the newspapers said that a temporary verbal arrangement had been made between Italy and Spain that sulphur might go free, but that the captain's opinion was that a mere verbal arrangement could not be relied on, and that the statements contained in the newspapers could be withdrawn at any moment.

Giving to the evidence every reasonable intendment, it falls far short, in our opinion, of making it the master's duty to change his arrangements to sail on the evening of the 7th of May. The Spanish proclamation of April 23, declaring sulphur to be contraband, had not been withdrawn, and it is evident that the master had no right, in justice to the other cargo owners, to make a longer delay. A perishable cargo of fruit was awaiting the vessel at Palermo, and no one could foretell what the result of the negotiations would be. The master and the ship cannot reasonably be charged with knowledge of subsequent events. And when they are examined they do not show that, within a reasonable period, any change in affairs was disclosed that would have made it safe beyond question to have sailed with the contraband cargo on board. It was not until May 10 that the British government, replying to Burrill & Sons' previous application for information, telegraphed that orders had been given not to treat sulphur for the present as contraband of war. And by telegram of that date it was further stated that the Spanish government states that "decree already issued cannot be altered," but that, as "temporary measure," naval departments have been ordered not to treat sulphur as contraband of war, "but they lay stress on the fact that the measure is temporary only."

Moreover, it does not appear when such orders were actually given, nor that they had been transmitted to war vessels which had sailed, under the directions of the proclamation of April 23, before such alleged orders were given. It was not until May 31 that the Spanish minister stated, in a note to the English ambassador at Madrid, that the treatment by Spain of sulphur as contraband of war would be temporarily suspended, and that the order which had been given to that effect would not be revoked without due notice. It does not appear that any formal agreement was ever made between Spain and Italy, or any other government, that the proclamation of April 23, declaring sulphur contraband of war, was withdrawn. And it is mere matter of conjecture whether, if the Styria had sailed, even as late as May 10, with sulphur on board, and had been arrested by a Spanish war vessel which had not received orders countermanding the proclamation, that the sulphur would not have been confiscated by a Spanish prize court. In any event, there was the liability of such an arrest and of the incident delay to both vessel and cargo.

Without protracting the discussion, we are of the opinion that the master was justified in landing and storing the cargo that had become contraband

by reason of the outbreak of the war between Spain and the United States, and by the Spanish proclamation of April 23; that, having acted reasonably with due regard to the interest of all concerned in so doing, it was not made his duty, by the facts brought to his notice, to reship the sulphur on the Styria and further delay his voyage.

The sulphur was subsequently, in pursuance of an agreement in writing, after the signing of the peace protocol between the United States and Spain, forwarded on the steamship Abbazia, belonging to the owners of the Styria, to the port of New York. Several questions arose in the courts below, under the terms of that agreement, and chiefly having reference to the measure of damages in case that the vessel was held liable. But as, for the reasons given, we hold that the vessel was not liable, those questions do not call for our consideration.

The decrees of the District Court and of the Circuit Court of Appeals, sustaining the libels of the respective libellants, are hereby reversed; the decrees of the Circuit Court of Appeals reversing the decrees of the District Court, dismissing the respective cross-libels, are hereby affirmed, and the causes are remanded to the District Court with directions to take further proceedings in conformity with the opinion of this court.

True copy.

Test:

Clerk Supreme Court, U. S.